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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THE STATE OF TEXAS,

Petitioner,

vs.

MICHAEL LEE HILL,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When presenting an objection pursuant to *Batson v. Kentucky*, must the party challenging the exercise of the other party's peremptory challenges raise this issue before the jury panel is discharged in order for the objection to be timely and, if so, may a state legislature circumvent such a rule by enacting a statute extending the time for raising the challenge to a point after the jury panel is discharged?

2. May an accused make out a prima facie case under *Batson* where only one member of a racial group is excluded by peremptory challenge and all other members of that group remain on the jury?

3. May a reviewing court determine that a *Batson* prima facie case was established based on factors different from those urged at trial by the objecting party?

4. Where the trial court makes no formal ruling on the existence of a *Batson* prima facie case but the attorney who has exercised the questioned peremptory challenges volunteers race-neutral explanations and the trial court then overrules the *Batson* motion without specifying the reasons for this ruling, may the reviewing court apply the mootness doctrine to avoid ruling on whether a prima facie case was made out, even though the reviewing court has determined that the explanations were not race-neutral and orders the conviction reversed?

5. In reviewing a decision of the trial court on the ultimate *Batson* question, may a reviewing court, applying the "clearly erroneous" standard of review, consider only those factors in the record that contradict the trial court's

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rejection of the *Batson* claim or is the reviewing court required to examine the record as a whole?

6. Where an accused claims his *Batson* rights were violated but presents no meaningful defense to the charges at trial and punishment is set by the trial court, is the reviewing court precluded from applying a harmless error analysis even where the convicting jury was racially mixed?

LIST OF PARTIES

MICHAEL LEE HILL,
Appellant below and Respondent herein

THE STATE OF TEXAS,[1]
Appellee below and Petitioner herein

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[1] The State of Texas is represented by the Dallas County District Attorney. See letter of authorization from Attorney General of Texas contained in Appendix.

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No. _____

In The

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October Term, 1992

THE STATE OF TEXAS,

Petitioner,

vs.

MICHAEL LEE HILL,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this proceeding on January 8, 1992. For clarity, reference to petitioner is by "State" or "Texas" and reference to respondent is by "Hill."

Following the denial of the State's first Motion for Rehearing on April 15, 1992, the State's second Motion for Rehearing was timely filed by mail and was received by the Court of Criminal Appeals on May 4, 1992. This second Motion for Rehearing was dismissed by the Court of Criminal Appeals on May 4 since the Court's mandate had issued on May 1, 1992.

OPINION BELOW

The opinion of the Court of Criminal Appeals appears in the Appendix as *Hill v. State*, 827 S.W.2d 860 (Tex. Crim. App. January 8, 1992).[2]

JURISDICTION

The opinion of the Court of Criminal Appeals was entered on January 8, 1992. On January 29, 1992, the State timely filed a first motion for rehearing. That motion was overruled, without further opinion, on April 15, 1992. The State's second Motion for Rehearing was timely filed by mail on April 28, 1992 and received by the clerk of the Court of Criminal Appeals on May 4, 1992. In the meantime, on May 1, 1992, the Court of Criminal Appeals had issued its mandate ordering a retrial on the case. Because the Court's mandate had issued on May 1, upon receipt of the State's second Motion for Rehearing on May 4, the Court ordered the State's second Motion for Rehearing dismissed.[3] Texas then filed her motion to recall the mandate of the Court of Criminal Appeals (and to stay reissuance of the mandate until 90 days had elapsed) to enable the State to seek review by this Court. This motion was received on May 27, 1992 and was overruled by the

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[2] The opinion of the Court of Appeals which was reviewed by way of Petition for Discretionary Review by the Court of Criminal Appeals of Texas is also included in the Appendix. This opinion is reported at: 787 S.W.2d 74 (Tex. App. – Dallas 1990).

[3] While awaiting the Court's determination of the State's Motion for Rehearing, counsel of record sought permission from the Attorney General of Texas to seek a Writ of Certiorari from this Court on behalf of the State. Permission was received on May 4, 1992.

Court of Criminal Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, Section 1 states in relevant part:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The instant case involves the prosecution and conviction of Hill for the offense of aggravated robbery[4] following a jury trial had in Dallas County, Texas. After the return of the jury's verdict on the issue of guilt, the State presented additional evidence to the trial court which set Hill's punishment at 60 years confinement in the Texas Department of Corrections.

The trial on the issue of guilt was extremely brief.[5]

The State's first witness was the complainant who testified she was the owner of a fabric store located in a strip shopping center in the city of Irving, Texas. On the day of the offense, shortly after the store had opened, Hill walked past the store, then returned and entered the store and began looking at fabric that was displayed. When the complainant asked if she could help him, Hill pulled a

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[4] TEX. PENAL CODE ANN. § 29.03 (Vernon 1989), proscribes the offense of aggravated robbery.

[5] The court reporter's transcription of the evidence offered to the jury on the issue of guilt is recorded in 62 pages of 25 lines per page. Defense counsel stated to the jury that the trial court was "unexpectedly very short."

small pistol from his waistband, pointed it at the complainant and responded that she could give him the night deposit. Since the store had just opened, there was no "night deposit." Informed of this fact, Hill then forced the complainant and the two other women in the store to the back wall of the display area of the store. Hill then indicated that he wanted the gold jewelry the women were wearing. After obtaining most of the jewelry in their possession, Hill indicated he wanted the women's purses. The victims retrieved their purses from various rooms in the rear of the store and gave them to Hill who placed them in a plastic trash bag. Hill then forced the women back to the front of the store where the cash register was located. After obtaining the money from the cash register, Hill then forced the three women into a classroom area and forced them to lie down. Hill indicated he had no sympathy for the women and was not afraid to hurt them[6] and that if they reported the offenses he would locate them using information contained in their purses. He removed a necklace from the neck of one of the other victims and told the women to stay on the floor for ten minutes and then left the store.

The State also called the other two witnesses, who basically corroborated the complainant's version of the events.

After the robbery, all three women were shown photographic line-ups at the police station. All three women positively identified Hill in open court as the robber.[7]

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[6] Or "blow them away" as another victim testified.

[7] The store was well lit. Each victim testified she had focused on Hill's face in an attempt to memorize it for purposes of future identification of him.

The defense was limited to having two of the victims state that although the robber had worn only a short sleeved shirt, leaving his hands and forearms completely exposed during the robbery, that they did not notice a tatoo that the Appellant had on his right hand. The parties stipulated that this tatoo was on the Appellant's hand well before the robbery.[8]

Hill did not testify in his own behalf nor did he call any witnesses.

As noted above, punishment was fixed by the trial court.

On appeal, Hill's sole point of error urged that the trial court had erred in refusing his motion to dismiss the jury panel on *Batson* grounds. Hill made this motion after the parties had struck their jury lists;[9] the trial court held

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[8] The third victim did not get a clear view of the gun or the hand holding it. The robbery lasted from five to ten minutes.

[9] The Texas jury selection system begins with a jury panel or venire being seated in the courtroom. After hearing the veniremen's excuses and testing the veniremen for absolute disqualifications, the trial court then permits voir dire examination by the attorneys. Challenges for cause may then be made by the parties based on facts disclosed during voir dire. The parties are then given jury lists of the remaining veniremen which are struck by the parties. Each side, in a non-capital felony, may exercise up to 10 peremptory challenges. The struck jury lists are then returned to the clerk and the first 12 veniremen who have not been peremptory challenged by either side become the jury. *See generally*, TEX. CODE CRIM. PROC. ANN. Chapter 35.

a hearing pursuant to TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989).[10]

At this hearing the Hill established that both he[11] and one of the veniremen peremptorily challenged by the prosecutor, a Mr. Lastun, were both black. It was also established that there were two black women on the jury selected to hear the case.[12]

Without making a **formal ruling** on the **existence of a prima facie case**, the trial court then asked the prosecutor if he would like to offer a racially neutral explanation for the peremptory challenge of Lastun. The prosecutor responded that he struck Lastun because: 1) "he's black," 2) "he's male," and 3) I didn't like the way he responded to my questions.[13]

Although the Texas appellate courts based many of their holdings on their subsequent determination that the

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[10] The text of article 35.261 is reproduced in the appendix. This statute was adopted by the Texas legislature in the wake of this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986).

[11] The trial court apparently took Hill's word for his racial status after specifically refusing to take judicial notice of this fact since Hill did not "look" black. The Court of Appeals found that the trial court *did* take judicial notice of Hill's race, 787 S.W.2d at 77, but this finding is without support in the record.

[12] Although the record on appeal was silent on this point, all parties and both courts below presumed that these three veniremen were the only blacks on the jury panel.

[13] With regard to this third reason it was subsequently developed that it was *not* the *content* of Lastun's brief answers to the few individual questions addressed to him, rather the prosecutor did not like the "way he responded to my questions, his attitude, his demeanor."

prosecutor engaged in "perfunctory voir dire" examination[14] of Lastun, it should be noted here that Hill did **not** urge this at trial either as a reason to find a prima facie case or as a basis for rejection of the prosecutor's race-neutral explanations. The trial court made no findings regarding the "perfunctory" nature of the voir dire examination.

Likewise, while gender-based peremptory challenges may violate the Equal Protection Clause,[15] Hill did not urge the trial court to reject the prosecutor's gender-based explanation. Rather, in urging the trial court to call a new array,[16] Hill relied *exclusively* upon the fact that the prosecutor's explanations "contained a racially motivated reason far excluding him (Lastun) . . . it was because he was black . . . that's one of the things he (prosecutor) said." (R.III-3-4).[17] It should be observed that the trial court never ruled on the existence of a prima facie case,

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[14] The prosecutor's individual questioning of Lastun **was** brief. That examination is set forth in the Court of Appeals' opinion at 787 S.W.2d 77-78. However, the prosecutor's examination of virtually **all** the veniremen was of **similar duration**. In this regard, the prosecutor treated Lastun like all other jurors.

[15] *See, Georgia v. McCollum*, ___ U.S. ___, 60 L.W. 4574,4575, n.3 (June 18, 1992). Federal defendants may rely upon the Fifth Amendment due process in this regard. *E.g., United States v. DeGross*, 960 F.2d 1433,1438, n.6 (9th Cir. 1992) (en banc); *United States v. Bishop*, 959 F.2d 820,823 (9th Cir. 1992).

[16] An "array" in the Texas practice is the jury panel. Pursuant to Art. 35.261, C.C.P., the *only* remedy for a *Batson* violation is to dismiss the jury that has been selected and to resume jury selection using a new array.

[17] The hearing in its entirety is set forth in the Appendix.

nor did Hill press for a ruling on this issue, either before or after the prosecutor had provided his explanations.

The trial court refused to dismiss the jury panel and the case proceeded to trial. Although the trial court refused Hill's motion, it did so *without* specifying the precise reason for its ruling. Thus, the trial court may have determined that no prima facie case had been made out, or it may have found the prosecutor's explanations to be credible and race-neutral.

As noted above, Hill was convicted by the jury and sentenced by the trial court.

On initial review of the case by the Dallas Court of Appeals, the State argued that because Hill's challenge to the State's peremptory strike of Lastun was made *after* the veniremen who were not selected for jury service had been dismissed, that it was untimely under *Batson* as interpreted by the Court of Criminal Appeals' earlier opinion in *Henry v. State*, 729 S.W.2d 732,737 (Tex. Crim. App. 1987).[18] The Court of Appeals agreed that under *Henry* Hill's objection *was* untimely. However, based on its interpretation of article 35.261, TEX. CODE CRIM. PROC., and its interpretation of "impanelled"[19] as used that *statute*, the Court of Appeals held that the "*Henry* rule that *Batson* challenges must precede the dispersal of

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[18] In *Henry*, a case decided before art. 35.261, C.C.P., was in effect, the Court of Criminal Appeals held that:

> [A] defendant may make a timely challenge within the *Batson* lines if such objection is made after the composition of the jury is made known but *before* the jury is sworn and the venire panel is discharged.

Henry, at 737.

[19] "Impanelled" is *not* defined in the Code of Criminal Procedure or in art. 35.261 itself. *Hill*, 787 S.W.2d at 76.

those who will not serve, has no further validity." *Hill*, 787 S.W.2d at 76.

The Court of Criminal Appeals upheld the Court of Appeals' determination that the Texas Legislature had enacted art. 35.261 with the intention of eliminating the "reconstituted jury" remedy for an Equal Protection violation resulting from the exercise of the State's peremptory challenges. *Hill*, 827 S.W.2d at 863-64. The Court reasoned that since under art. 35.261, C.C.P., the sole remedy for such a violation is to "call a new array," and objection to the State's strike need not be lodged before the venire is discharged since if a violation is found, that venire can no longer be used.[20]

Next, the State argued that Hill's showing that a single black venireman had been struck by the State,

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[20] This argument, the State pointed out to both Texas appellate courts, is flawed in that it proceeds from the premise that the *only* function of having the venire present while the *Batson* issue is determined is to make the improperly struck veniremen available to serve as replacements should the trial court elect to remedy a *Batson* violation by restoring any improperly excluded veniremen to the original jury. However, the continued presence of the jury panel serves other functions. Disputes may arise (just as the trial court here initially disputed Hill's claim that he was black) as to the race of veniremen who are excluded by a peremptory challenge that is alleged to have been exercised in violation of *Batson*. Thus, it is critical that the challenged veniremen be on hand so that the trial court may determine their race. Such determinations may also be important as to non-challenged veniremen where the party presenting a *Batson* attack maintains that the other side *failed* to strike similarly situated veniremen of a race different from the race of the protected group *i.e.*, engaged in "disparate treatment." This approach is sometimes utilized in an attempt to refute the race-neutral explanations offered by the party defending its peremptory challenges.

while the other two black venirepersons had been allowed to serve, could not constitute the "pattern" of discrimination required to establish a prima facie case of purposeful discrimination. Without such a showing, the State argued, Hill was not entitled to have the prosecutor explain his peremptory challenges or to examine the prosecutor as to these reasons.

Although *only* a numerical analysis of the racial composition of the prosecutor's peremptory strikes had been urged at trial as a basis for finding a prima facie case, the Court of Appeals held that the "perfunctory" voir dire examination of Lastun had raised an "inference of purposeful discrimination" and that the "trial judge (had) determined that a prima facie case was established." *Hill*, 787 S.W.2d at 78. Of course, **no such finding** was made by the **trial** court and if such a finding could be said to have been *implicitly* made by the trial court, it could only have been properly based on Hill's assertion at trial that the State had peremptorily struck a black venireman, not on the "perfunctory examination" rationale which was seized upon *sua sponte* by the Court of Appeals.[21]

The Court of Criminal Appeals refused to review the Court of Appeals determination that a prima facie case of purposeful discrimination was made out. Since the prosecutor had articulated reasons for the challenged peremptory strike and the trial court had ruled on the ultimate question of intentional discrimination,[22] the existence of a

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[21] Even before the Court of Appeals, Hill made no claim that the "perfunctory examination" of Lastun supported an implicit finding of a prima facie case of the trial court.

[22] Here, the Court of Criminal Appeals relied on this Court's opinion in *Hernandez v. New York*, 500 U.S. ___, 111

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prima facie case was held to be a moot question. *Id.*, 827 S.W.2d at 865.

Finally, as to the trial court's *acceptance* of the prosecutor's non-race based explanations of shared gender and unsuitable demeanor, which the State asserted, were unrefuted at trial, the Court of Appeals held that because the "perfunctory examination" of Lastun and a reason (demeanor) deemed "unrelated to the facts of the case"[23]

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S.Ct. 1859,1866, 114 L.Ed.2d 395 (1991). *Id.* Thus, the Court of Criminal Appeals treated the trial court's action as a *non-ruling* on the existence of a prima facie case, rather than the *implicit* finding of a prima facie case interpretation of the trial court's ruling employed by the Court of Appeals. Of course, the Court of Criminal Appeals failed to consider a crucial factor distinguishing this case from *Hernandez*. In *Hernandez*, the appellate courts upheld the finding below that the government had *refuted* the prima facie case with her race-neutral explanations, whereas in the case *sub judice* the appellate courts *overruled* the trial court's ruling that Hill had failed to carry his burden on the "ultimate question of intentional discrimination." Application of the mootness doctrine is appropriate in the *Hernandez* situation, the State argues, but not in the present procedural posture.

[23] *Hill, id.*

In *Hernandez v. New York*, 500 U.S. ___, 111 S.Ct. 1859,1866, 114 L.Ed.2d 395 (1991) this Court determined that the race-neutral explanation need not be related to the facts of the case in any particular way:

> "A neutral explanation . . . means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

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the trial court's ultimate rejection of Hill's *Batson* claim could not be deemed supported by the evidence. The Court of Appeals simply failed to address the State's claims that the non-race based explanations also offered had not been refuted at trial or the related argument that the credibility of these explanations must be reviewed in light of the fact that *all* other blacks on the panel were allowed to serve on the jury as well as the fact that the resulting jury had a higher ratio of blacks than were present on the jury panel from which the jury was selected.

Finally, regarding the prosecutor's reliance on race for *part* of the reason for striking Lastun, the Court of Criminal Appeals was divided 5-4 in its analysis. The majority of the Court *agreed* in the abstract with the State's argument that

> [I]identification between the (peremptorily challenged) venireman and the (defendant) can be a legitimate race-neutral reason for the exercise of a peremptory challenge . . . even if one of the factors relied upon to establish identity is shared race, so long as there are other non-racial factors which also establish identity.
>
> * * *
>
> [R]ace may be a factor co-existing with a non-racial reason for a strike, however, race may *not* be the reason for the strike.

Hill, 827 S.W.2d at 866 (emphasis original).

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Thus, Texas has maintained that both the demeanor and the unobjected to shared-gender explanations offered by the prosecutor *were* race-neutral and since they were not refuted at trial, the acceptance of them was not clearly erroneous.

However, this abstract agreement with the State's position was *sharply limited* by other language in the majority opinion, suggesting that the existence of a high percentage of characteristics common to both the accused and the venireman struck by the government[24] could *not* constitute a race-neutral explanation for a peremptory challenge where one of the factors considered was race, *unless* there was a particular reason for race to be considered which was "related to the particular case to be tried." *Hill*, 827 S.W.2d at 868. A footnote appeared to make the majority's exception to the "bright line" rule even more restrictive: race could be properly considered *only* if the veniremen, when questioned admitted to having a "racial bias" himself. *Hill, id.* at n.8.

As to the "shared gender" reason offered by the prosecutor for striking Lastun (recall that the two black *female* venire persons were not struck), the Court of Criminal Appeals held that this was *not* a sufficient explanation to "establish a constitutional; non-race based identity." *Hill*, 827 S.W.2d at 869.

Regarding the prosecutor's explanation that focused on his perception of unfavorable demeanor on the part of Lastun,[25] the majority held this was an unsatisfactory

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[24] At oral argument the State posed the hypothetical strike of a venireman who like the defendant was a 1) black, 2) ex-Marine, 3) divorced, 4) Baptist, 5) wearing an eye-patch, and 6) employed as a truck driver, where the prosecutor states that all these shared characteristics were considered of equal importance in the decision that the venireman might be likely to (consciously or not) identify with the accused and should therefore be challenged.

[25] The Texas courts have traditionally been wary of accepting demeanor based explanations for peremptory challenges of

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explanation in light of the fact that voir dire of Lastun was "perfunctory" *Id.* at 869.

The concurring opinion of the Court of Criminal Appeals would have imposed an outright "bright line" test for partial reliance on race criminal cases[26] which it summarized as follows:

> [E]qual protection is denied whenever race is a factor in the exercise of a peremptory challenge. This . . . rule is necessary because one simply cannot articulate a race-neutral explanation for exercising a peremptory challenge when race is part of that explanation.
>
> *Hill*, 827 S.W.2d at 875 (concurring opinion).

REASONS FOR REVIEW

I.

The Court of Criminal Appeals holdings have critical importance to the interpretation of *Batson*, and if left undisturbed, the holdings will severely undermine the public's confidence in the criminal justice system.

The instant case presents this Court with an opportunity to clarify several procedural components of the mechanism for protecting Equal Protection Clause rights

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Batson-protected veniremen, fearing that such explanations may be used to mask race-based motives. Such concerns are especially overstated where as to the particular venireman in question, the prosecutor has *admitted to* race-based concerns, while maintaining that race-based motives were not dispositive.

[26] The concurring opinion stated that the Texas Supreme Court had already developed a "bright line" test for Texas civil cases. *Hill*, 827 S.W.2d at 874, citing *Powers v. Palacios*, 813 S.W.2d 489 (Tex. 1991).

first developed in *Batson v. Kentucky*.[27] As this Court has expanded the scope of the *Batson* procedure, eliminating the *Batson's* shared race standing requirement,[28] applying *Batson* procedures to civil trials,[29] limiting the right of criminal defendants to exercise their peremptory challenges based on race,[30] and as it begins to consider whether gender-based or religion-based peremptories should also be restricted,[31] the need for at least a rough framework of procedural guidelines that are uniform and capable of consistent application by the trial courts of our nation increases exponentially. In addition, this Court needs to act to restore primary control of *Batson* hearings to **trial** courts rather than allowing appellate courts to continue to be the ultimate arbiters of the facts involved in every *Batson* claim.[32]

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[27] *Batson* itself was in essence a "procedural" change from prior law, altering not the rule against racially based peremptory challenges but the *evidentiary formulation* for *establishing* such a violation.

[28] *Powers v. Ohio*, 500 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

[29] *Edmonson v. Leesville Concrete Co.*, 500 U.S. ___ (1991).

[30] *Georgia v. McCollum*, ___ U.S. ___, 60 L.W. 4574 (1992).

[31] *Id.*, at 4575, n.3; *see also, Eiland v. State*, ___ A.2d ___ (Md. Ct. Spec. App. May 29, 1992) and *State v. Burch*, ___ P.2d ___ (Wash. Ct. App., 1st Dir. May 26, 1992), both reported in 51 Cr.R.Rptr. 1245,1250.

[32] Nowhere is the trend toward appellate court control over *Batson*-related fact-finding more disturbing or widespread than in Texas, where the Court of Criminal Appeals and lower appellate courts reviewing the record on appeal routinely consider evidence *not* urged in the trial court, and utilize this evidence to conclude that the trial court's rejection of a *Batson*

(Continued on following page)

The precise procedural points raised by the instant case are outlined in the questions presented and specifically addressed in the remaining reasons for review. These issues are not limited in their scope to the instant case, rather they are issues which are inherent in virtually all *Batson* cases. While this Court's *Batson* majority sought to **enhance** "public respect for our criminal justice system,[33] respect for this system is seriously eroded when factually correct jury determinations are overturned because of what the public correctly perceives as legal technicalities. Here, for example, Hill obtains a new trial because his jury had only two rather than all three of the black veniremen on the 42 person jury venire. Yet, Hill offered only the weakest imaginable defense and elected to have the trial court set his punishment. Thus, no real issues of fact were presented to the jury.

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motion was erroneous and that the conviction must be reversed. This case, with its emphasis on the "perfunctory voir dire" issue (raised for the first time by the Court of Appeals) and *Young v. State*, 826 S.W.2d 141 (Tex. Crim. App. 1991) (defendant *not* required to request trial court to make *Batson* finding based on certain evidence introduced at hearing to enable reviewing court to consider that evidence, in overruling trial court's *Batson* determination), are the two most glaring (but by no means the only) examples of this trend. Such an approach is contrary to the practice generally followed in federal courts which is to allow the trial court "discretion to fashion the procedure necessary to evaluate counsel's race-neutral explanation," and when reviewing these credibility determinations to accord "great deference on appeal to the trial court because of the inherent credibility assessment." *E.g.*, *Moore v. Keller Industries, Inc.*, 948 F.2d 199,201 (5th Cir. 1991).

[33] *Batson v. Kentucky*, 476 U.S. 79,99 (1986).

Moreover, the important Equal Protection Clause goals that *Batson* seeks to protect are imperiled when trial court judges see their fact determinations reversed based on facts not urged at the trial hearing. The long term consequences of such second-guessing by appellate courts can only be a shift away from finding a prima facie case on the part of the trial court judges seeking to insulate themselves from an endless series of retrials, thereby frustrating the legitimate goals of *Batson*.

II.

This Court should grant review to determine whether *Batson* challenges may be raised after the jury panel has been excused.

The State believes that this Court intended that *Batson* challenges be raised as soon as the basis for the challenge became apparent,[34] rather than after the venire has been excused from service and its members have dispersed.[35]

The presence of the venire throughout the *Batson* hearing can serve important functions.[36]

The Texas courts' interpretation of the language of art. 35.261, C.C.P., in the instant case, permits a challenge to be made after the window of opportunity has closed

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[34] Obviously, this Court in *Batson* was writing for a nation in which several different types of jury selection mechanisms are employed. Thus, the Court was reluctant to detain the *precise* procedures to be employed in each state.

[35] Texas courts that considered this issue without regard to the distorting effects of art. 35.261 had uniformly held as much.

[36] *See*, n.20, *supra*.

for gathering further information from the venire and eliminates the possibility of utilizing the reconstituted jury remedy if a *Batson* violation is found by the trial court.

This Court should also review the related question of whether the Texas Legislature could properly limit the *means* available to the trial court to remedy a *Batson* violation to the new jury panel remedy. *Batson* itself purported to leave the remedy for violation of its prohibition of race-based peremptory challenges to the trial courts. *Batson*, 476 U.S. at 99, n.24. The sole remedy allowed under art. 35.261, calling a new venire, is ill-suited to the post-*McCollum* era of *Batson* hearings since many defendants do not wish to go to trial. Therefore, *Batson* violations by criminal defense counsel may be best deterred by mandating the availability of the reconstituted jury remedy.

If this Court is at all concerned with the effects the practical realities of jury trials have on the enforcement of its announced constitutional rights, it should consider this: a trial judge faced with throwing out an entire morning or day's work[37] spent on jury voir dire if a *Batson* violation is found will be much more resistant to finding a *Batson* violation than will a judge who can remedy any violation by substituting those jurors improperly struck, a resolution that can be accomplished in a few short minutes. Just as practical realities compelled development of a new evidentiary formulation for

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[37] In capital cases, where individual jury voir dire is permitted, jury selection lasts, typically three to six *weeks*, thus dramatically increasing the size of the baby that the new jury panel remedy requires be thrown out with the bath water.

establishing a violation of the Equal Protection Clause in *Batson*, such realities must be considered in formulating the remedies for such violations when they occur.

III.

This Court should determine whether in a case where no formal ruling of the existence of a prima facie case was made by the trial court and no specific reason is given by the trial court for its rejection of a *Batson* motion, the reviewing court may overrule the trial court's decision on the ultimate *Batson* issue while simultaneously refusing to consider the question of whether the party making the *Batson* challenge made out a prima facie case of purposeful discrimination on the ground that the existence of a prima facie case becomes moot simply because the attorney exercising the peremptory challenges volunteered his explanation for challenges to the trial.

At the outset, Texas recognizes that if the trial court has conducted a "full" *Batson* hearing[38] and *rejects* the *Batson* claim, where the reviewing appellate court determines that the trial court properly accepted the explanations offered as race-neutral there is little immediate utility to be found in becoming "bogged down"[39] in the

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[38] By "full" hearing the State means one in which the trial court hears the explanations of the party whose peremptory strikes are challenged and allows cross-examination of that party's attorney and then entertains any refutation of these explanations offered by the party advancing the *Batson* claim.

[39] *See, United States v. Forbes*, 816 F.2d 1006,1010 (5th Cir. 1987). There the Court of Appeals looked to Title VII case law for guidance.

issue of whether a prima facie case of purposeful discrimination was made out.[40] This Court recognized this principle only last term in *Hernandez v. New York*, where faced with a similar issue,[41] the Court stated:

> "Where the defendant (in a Title VII case) ***has done everything that would be required of him*** if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711,715 . . . The ***same principles*** applies under *Batson* ***once a prosecutor has offered a race neutral explanation*** for the peremptory challenges . . . the preliminary issue of whether the defendant made a prima facie showing becomes moot.
>
> *Hernandez*, 500 U.S. ___, 111 S.Ct. at 1866, 114 L.Ed.2d at 405.

Of course, in *Hernandez* this Court *upheld* the lower appellate court's determination that New York had provided acceptable race-neutral explanations for her challenged peremptories.

The *instant case* presents the *opposite* situation found in *Hernandez*. Here the trial court rejected the defendant's *Batson* claim without specifying the specific reason for

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[40] Of course, there is *some* utility in making such a review since the fact patterns present in the case under review, insofar as the prima facie case issues are concerned, may well be present in future cases. Thus, with an emerging body of law, such as *Batson* doctrine, appellate review of the correctness of trial court decisions on the prima facie case issue may provide much needed guidance to bench and bar.

[41] There the prosecutor had voluntarily defended his strikes and as a result the trial court had made no ruling on the existence of a prima facie case. *Hernandez*, 111 S.Ct. at 1866, 114 L.Ed.2d at 405.

this holding.[42] However, the Texas appellate courts *reversed* the trial court's ultimate rejection of the *Batson* motion and ordered a new trial after *finding* that the *prosecutor* had *not offered a credible race-neutral explanation*.

It is now axiomatic that the prosecutor's obligation to provide an acceptable explanation is conditioned upon the defendant having first establishing a prima facie case.

Where the appellate court reverses the trial court's fact finding as to the credibility of the prosecutor, the issue of the existence of a prima facie can hardly be said to be irrelevant.[43] This is particularly true where, as here:

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[42] Although the Texas Court of Appeals found an *implicit* holding that a prima facie case was made out, this approach is inconsistent with federal court practice.

[43] Although *Batson* borrowed from Title VII procedures for its analytical framework, a *Batson* hearing is *not* a civil trial on the merits. This distinction is important for several reasons.

First, in a civil trial the parties' positions have been, before trial, rather specifically defined by written pleadings which the parties have reviewed at their leisure and after having had the advantage of learning, through pre-trial discovery, virtually all of the evidence that will be offered at trial. Matters outside the pleadings will not support a verdict and evidence not disclosed in discovery will not generally be admitted at trial. By contrast, *Batson* hearings are of infinitely shorter duration. The prosecutor's explanations (which must be given for *any* race and perhaps gender of challenged veniremen, not just on one employee) are provided at a moment's notice and can be refuted on appeal, as in the instant case, by evidence and legal theories never urged at trial.

Second, a decision to exercise a peremptory challenge is not remotely similar to an employment hiring or termination decision. In the termination case the employer has the past performance of an employee to evaluate rationally, in a hiring situation there are lengthy interviews, past job performance, lie

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1) the trial court *may* have based its ruling on the lack of a prima facie case rather than an acceptance of the race-neutral explanation offered by the prosecutor, and 2) the appellate courts have found the explanation offered at trial unacceptable, but based this holding on factors *not* urged by Hill before the trial court judge.

Moreover, in light of the ever broadening application of *Batson*, to criminal defense counsel, to civil cases, to matters of gender and religion, and with the post-*Powers* elimination of the requirement of racial unity between the objecting party and the peremptorily challenged juror, the prima facie case requirement is the *only* thing which prevents every party from routinely being required to give bias-neutral explanations for each and every peremptory challenge.[44]

(Continued from previous page)

detector tests and performance tests available to evaluate in the context of the employers' needs. In jury selection, there are typically a few minutes of voir dire examination to go on. Furthermore, a lawyer must decide whether to hire (accept) or fire a juror based not only upon *his* needs, but with one eye on his opponent's perceived needs and peremptory challenges that may be exercised by the opponent.

[44] To be borne in mind here is Justice Thomas' concerns expressed in his concurring opinion in *McCollum*:

> . . . our departure from *Strauder* has taken us down a slope of inquiry that had no clear stopping point. *McCollum*, ___ U.S. ___, 60 L.W. at 4580.

This need for "stopping point" suggests that this Court should buttress, rather than eliminate the prima facie case requirement that *Batson* established as a prerequisite to a full hearing on the propriety of the exercise of the peremptory challenge.

IV.

This Court should review this case to determine whether a prima facie case can be made out by the peremptory challenge of a single black venireman where all other black veniremen on the jury panel serve on the jury.

In *Batson* this Court held that a prima facie case of purposeful discrimination can be made only by a showing that

> . . . the prosecutor has exercised peremptory challenges to remove **members** of a defendant's face from the venire . . .
>
> *Batson*, 476 U.S. at 96 (emphasis supplied).

In the instant case one black venireman was struck while the two other blacks on the panel served on the jury.

Every federal appellate court that has considered this question has held that the strike of a single black venireman cannot standing alone constitute a prima facie case.[45] Where the government has exercised a low ratio of its peremptory challenge against blacks, Texas courts have

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[45] *E.g.*, *United States v. Malendez*, 962 F.2d 332,333, n.2 (4th Cir. 1992); *United States v. Fuller*, 887 F.2d 144,147 (4th Cir. 1988); *United States v. Lewis*, 892 F.2d 735,736-37 (8th Cir. 1989); *United States v. Lewis*, 837 F.2d 415,417 (9th Cir. 1988); *United States v. Esparsen*, 930 F.2d 1461 (10th Cir. 1991); *United States v. Chalcan*, 812 F.2d 1302,1313-14 (10th Cir. 1987) (striking a single member of the defendant's race will not establish a prima facie case, *unless* jury has no members of his race); *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1923, 95 L.Ed.2d 814 (1978); *see generally*, cases collected in *United States v. Clemons*, 843 F.2d 741,746-47 (3rd Cir. 1988).

reached a similar result,[46] as have courts of her sister states especially where some blacks serve on the jury.[47]

Some federal circuit courts of appeals have held that even where the strikes are badly skewed against a racial

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[46] *Rijo v. State*, 721 S.W.2d 562,564 (Tex. App. – Amarillo 1986, no pet.) (strike of one black on panel not sufficient to establish prima facie); *see also, Campbell v. State*, 775 S.W.2d 419,422 (Tex. App. – Houston [14th Dist.] 1989, pet. ref'd). The Court of Criminal Appeals has stated "circumstantial evidence of intent may be proven by disparate impact where *all* or *most* of the challenges were used to strike blacks." *Keeton v. State*, 749 S.W.2d 861,867 (Tex. Crim. App. 1988) (opinion on rehearing).

Indeed, the Court of Criminal Appeals has recently stated that the "modicum" of evidence required to establish a prima facie case can be established by numerical analysis alone only where that analysis reveals a "repetition of such strikes in suspiciously large numbers – numbers larger than one would expect if race had nothing to do with it." *Linscomb v. State*, 829 S.W.2d 164,166 (Tex. Crim. App. 1992). The *Linscomb* court went on to state: "Establishing a *prima facie* case in this way, based only on the relative number of peremptory challenges against members of an identifiable race, is not impossible." *Id.* The instant case, however, illustrates that establishing a prima facie case in this way is *always possible* and since every veniremember belongs to some racial group, the practical effect of the opinion below is a *de facto* elimination of the prima facie case requirement.

[47] *See, State v. Griffin*, 756 S.W.2d 475,481-82 (Mo. 1988) (5 of blacks removed, trial court found no prima facie case); *Commonwealth v. Hardy*, 775 S.W.2d 919,920 (Ky. 1989) (one black struck by state, one "removed by lot," remaining black served on jury, no prima facie case); *State v. Smith*, 358 S.E.2d 389,390 (S.C. 1987) (two of five blacks struck; blacks served on jury, no prima facie case).

group numerical analysis of the peremptory challenges cannot, standing alone establish a prima facie case.[48]

This Court should determine whether the striking of a single black venireman can, standing alone, constitute a prima facie case.

V.

This Court should decide whether an appellate court applying the clearly erroneous standard may reverse a trial court's *Batson* rulings based on facts contained in the appellate record, but not specifically brought to the trial court's attention while at the same time ignoring the facts established and urged at trial that support the trial court's ruling.

In the instant case the Texas appellate courts, purporting to apply the "clearly erroneous" standard of review[49]

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[48] *United States v. Jordan*, 893 F.2d 182,183-84 (8th Cir. 1990); *United States v. Temple*, 890 F.2d 1043,1045-46 (8th Cir. 1989); and *see* case collected in *United States v. Esparsen*, 930 F.2d at 1467.

[49] The Court of Appeals applied the supported by the evidence standard that was formerly applied by Texas appellate courts to *Batson* claims. Before the case reached the Court of Criminal Appeals, that court altered the standard of review to the "clearly erroneous" standard applied by federal courts. *See, Hill*, 827 S.W.2d at 865-866. This change was made to enable the Texas courts to utilize a "well-established analysis" in order to obtain consistent results, *Whitsey v. State*, 796 S.W.2d 707,724 (Tex. Crim. App. 1989) (opinion on rehearing), although the majority Court of Criminal Appeals has always maintained the two standards of review were "analytically and intellectually the same," in the instant case the Court of Criminal Appeals disavowed "the nomenclature" used by the Court of Appeals. *Hill*, 827 S.W.2d at 866.

overruled the trial court's rejection of Hill's *Batson* challenge based primarily upon the appellate courts' determination that the voir dire of Lastun was "perfunctory."

At the same time the Texas appellate courts refused to consider at any point in their review the fact that all but one black served on the jury, although this fact was urged in both appellate courts by the State.

Thus, this case raises the issue of whether an appellate court may pick and choose which factors it will consider in reviewing a trial court's *Batson* ruling, a question that in theory should be answered "no."[50]

In the instant case, the Texas appellate courts shifted the primary focus of their inquiry from the ultimate *result* of the prosecutor's actions (whether a racially balanced jury was produced) which is a question that can be resolved without resorting to inferences of intent, to collateral questions of whether the prosecutor *arrived at* his decision based on improper motives. The motives of the prosecutor are more properly limited to questions of whether a prima facie case was established. Once that question has been answered affirmatively, matters such as *how* the voir dire was conducted must become secondary to the ultimate question of whether the entire jury

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[50] The *Whitsey* majority seemed to say that the clearly erroneous standard, like the supported by the record standard, required the appellate court to " . . . take the record as we find it . . . we cannot add facts, assume facts, disregard facts, or accord certain facts greater or lesser significance." *Whitsey*, 796 S.W.2d at 723, n.6.

The *Whitsey* court noted that under the clearly erroneous standard trial court's credibility determinations are entitled to great weight and the reviewing court should *not* undertake to "duplicate the role of the trial court." *Whitsey*, at 722.

selection process resulted in a jury that was so racially imbalanced that a just community cannot adopt that jury's verdict as its own.

VI.

This Court should grant review to determine whether there are any circumstances under which harmless error analysis may be properly applied to *Batson* error.

Generally, all trial errors even those of constitutional dimensions must be subjected to harmless error analysis[51] by the reviewing appellate court which is to consider the trial record as a whole. This principle rests on the recognition that there can be no such thing as an error free, perfect trial. *United States v. Lane*, 474 U.S. 438,445 (1986). There are of course, some categories of constitutional errors to which this Court has declined to apply a harmless error analysis, including racial discrimination in the selection of a petit jury or in the selection of a grand jury. *See, Dawson v. Delaware*, ___ U.S. ___, 112 S.Ct. 1093,1099, 117 L.Ed.2d 309 (1992) (Blackmun J. concurring). In *Rose v. Mitchell*, 443 U.S. 545 (1979), this Court refused to apply harmless error analysis to racial discrimination in the selection of grand jurors.

However, it should be noticed that when the appropriateness of application of the harmless error doctrine to racial discrimination in the grand jury selection process was again before this Court in *Vasquez v. Hillary*, 474 U.S. 254 (1986), Justice Powell, who authored this Court's opinion in *Batson v. Kentucky*, dissented to the continued

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[51] The harmless error test was enunciated in *Chapman v. California*, 386 U.S. 18 (1967).

refusal to apply harmless error analysis where the defendant was convicted in an otherwise fair trial. *Vasquez*, 474 U.S. at 268-72.[52] Likewise, Justice White who provided the crucial fifth vote in his concurring opinion in *Batson*, specifically excepted to the *Vasquez* majority's statement that racial discrimination in grand jury selection was "not amenable to harmless error review" since the effect of the violation cannot be ascertained. *Vasquez*, 474 U.S. at 609, n.6.[53]

Thus, it cannot be said that a majority of this Court has ever clearly adopted the notion that a *Batson* violation can never be properly subjected to harmless-error analysis.

Batson itself involved the conviction of a black defendant from which **all** four black veniremen had been removed by means, resulting in an all-white jury.[54] By contrast, the instant case involves the removal of only one black venireman with the other two serving on the jury.

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[52] Justice Powell wrote that:

> [A] rational system of justice recognizes that not every violation (of constitutional rights) undermines the fairness of a given conviction. *Vasquez*, 474 U.S. at 272.

[53] Reliance upon the grand jury cases as a basis for rejecting application of harmless error analysis to *Batson* issues must also be tempered with the recognition that *proof* of an Equal Protection violation requires to establishment of systematic exclusion of a racial ground from grand juries over a period of time, a much more encompassing violation than the case-by-case approach now utilized under *Batson* for proof of racial discrimination in petit jury selection.

[54] In *Batson*, this Court "surmised . . . that all white juries might judge black defendants unfairly." *McCollum*, ___ U.S. ___ at 60 L.W. at 1580 (Thomas, J. concurring).

The harm that *Batson* seeks to avoid is injury to a criminal defendant resulting from doubt cast on the integrity of the judicial process and the fairness of a criminal proceeding. *Powers v. Ohio*, 499 U.S. at ___, 111 S.Ct. at 1364.

However, in *McCollum*, Justice O'Connor observed that:

> [T]here is substantial reason to believe that the distorting influence of race is minimalized on a racially mixed jury.
>
> *Id.* ___ U.S. at ___, 60 L.W. at 4582 (O'Connor, J., dissenting).

Thus, where as here, the accused is convicted by a jury that has a *higher ratio* of blacks than did the jury panel from which the jury was selected and than the community as a whole, there is reason to believe that the *perceived* quality of fairness of the proceeding was not so undermined that the severe remedy of a new trial is required.

The State believes that the integrity of the criminal justice cannot be undermined by a conviction by a racially mixed jury, obtained in an otherwise fair trial, where the defendant, like *Hill* has offered no meaningful defense and punishment is set by the trial court. To hold otherwise is to indulge in the assumption that black jurors are inclined to acquit black defendants simply because of their shared race, a proposition that is unsupported in either fact or the theories of public perception that underlie the need for the *Batson* evidentiary formulation.

Moreover, where no defense is offered by the accused, it cannot be convincingly argued that harmless error analysis is inappropriate on the theory that the degree of harm to the defendant cannot be ascertained by the reviewing court. It hardly requires a leap of faith to assume that Hill would have been convicted by a jury

with three black jurors just as he was by a jury with two black veniremen.

Finally, this Court's holding in *McCollum* suggests an additional reason why the appropriateness the application of harmless error analysis to *Batson* rulings should now be given serious consideration by this Court. In the post-*McCollum* era it is now theoretically possible for *both parties* (in either a civil or criminal trial) to violate *Batson* in a single case and to have such violations go undetected by the trial court. In such a case, it would seem absurd to require a new trial where *both sides* have engaged in the same constitutional violation, perhaps to the same degree.[55]

CONCLUSION

For the various reasons outlined above, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

JEFFREY BRIAN KECK
Assistant District Attorney
Dallas County, Texas
Counsel of Record

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[55] See for example this Court's approach in applying the "invited reply rule" where improper jury arguments are made by both sides in *United States v. Young*, 470 U.S. 1 (1985). There, this Court was able to "consider the probable effect" of the prosecutorial arguments to determine whether the error was prejudicial, while simultaneously factoring in the remarks of defense counsel and the rest of the trial. This is surely not a task that is more difficult than applying harmless error to certain varieties of *Batson* error.

APPENDIX

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OPINIONS BELOW

[827 SW2d 860]

Michael Lee HILL, Appellant,

v.

The STATE of Texas, Appellee.

No. 347-90

Court of Criminal Appeals of Texas,
En Banc.

Jan. 8, 1992.

Rehearing Denied April 15, 1992.

[861]

Lawrence G. Boyd, Dallas, for appellant.

John Vance, Dist. Atty., and Jeffrey Brian Keck, Asst. Dist. Atty., Dallas, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

MALONEY, Judge.

Michael Lee Hill, appellant herein, was convicted by a jury of aggravated robbery. V.T.C.A., Penal Code, Section 29.03. He was sentenced by the trial court to confinement for sixty years in the Texas Department of Criminal Justice, Institutional Division. Appellant appealed to the Court of Appeals alleging that the trial court erred in denying his claim that the State violated the rule of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and article 35.261 of the Texas Code of Criminal Procedure, by exercising a peremptory challenge against

a black venireman in a racially discriminatory manner. The Court of Appeals reversed the conviction on the basis of appellant's claim. *Hill v. State*, 787 S.W.2d 74 (Tex.App. – Dallas 1990).

The State filed a petition for discretionary review raising three grounds: (1) appellant's claim was not timely; (2) appellant did not establish a prima facie case of purposeful discrimination; and (3) the Court of Appeals applied the wrong appellate standard of review in determining the correctness of the trial court's finding that the prosecutor provided a race-neutral explanation for striking a prospective juror. We granted the State's petition on all three grounds. We will affirm.

In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant." *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719.

In this case, there were five African-Americans on the venire. Two of the five were at the end of the panel and, thus, were not reached. Of the remaining three, two women sat on the jury and one male was peremptorily challenged by the prosecutor. When the appellant objected to the exclusion of the black male on the basis of *Batson* and article 35.261 of the Texas Code of Criminal Procedure, (V.A.C.C.P.), the prosecutor responded that he challenged the venireman "because I felt like he would identify with the defendant. He's black, he's male, and I

didn't like the way he responded to my questions." The trial court overruled appellant's objection. The Court of Appeals reversed, holding that the prosecutor violated the equal protection clause of the United States Constitution and also violated article 35.261, V.A.C.C.P., by exercising a peremptory challenge against a black venireman on the basis of his race.

I.

WAS APPELLANT'S CLAIM UNDER ART. 35.261, V.A.C.C.P. TIMELY?

Appellant voiced his objection after the venire was discharged but before the jury was sworn. The State alleges that appellant's claim should be dismissed as untimely under the authority of *Henry v. State*, 729 S.W.2d 732, 737 (Tex.Cr.App.1987), where this Court held that a *Batson* **[863]** objection must be made "after the composition of the jury is made known but before the jury is sworn and the venire panel is discharged."[1] Subsequent to the *Henry* decision, however, the legislature enacted article 35.261, specifying that a *Batson* objection can be timely interposed "[a]fter the parties have delivered their lists [of peremptory challenges] . . . and before the court has impanelled the jury." Art 35.261(a), V.A.C.C.P. Both *Henry*

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[1] We note that although the State failed to object to the timeliness of defendant's motion in the trial court, the State is not precluded from raising it on appeal. *Cooper v. State*, 791 S.W.2d 80 (Tex.Cr.App.1990) (opinion on State's motion for rehearing).

and article 35.261(a) require that the objection be made before the jury is impanelled, but only *Henry* requires that it also be made before the venire panel is discharged. Appellant contends that the time requirements of article 35.261 govern, not those set out in *Henry*. We agree with appellant.

In *Batson*, the Supreme Court did not specify the procedural mechanism for a *Batson*-based objection, explaining that

> [i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire. [citations omitted].

Batson, 476 U.S. at 100 n. 24, 106 S.Ct. at 1725, n. 24.

To codify and implement *Batson* in Texas, the legislature enacted article 35.261 V.A.C.C.P. *Oliver v. State*, 808 S.W.2d 492 (Tex.Cr.App.1991); *Carrion v. State*, 802 S.W.2d 83, 87-88 (Tex.App. – Austin 1990). We have held that article 35.261 was "intended to create uniform procedures and remedies to address claimed constitutional violations during jury selection." *Oliver*, at 496. Therefore, whenever a claim is made that veniremembers were peremptorily

challenged on the basis of their race, article 35.261 must be followed.

Article 35.261, V.A.C.C.P., provides:

> (a) After the parties have delivered their lists [of peremptory challenges] to the clerk . . . and before the court has impanelled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.
>
> (b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

The Court of Appeals held that, in light of the express provisions of article 35.261, *Henry*, "no longer governs the timeliness of a challenge." *Hill*, 787 S.W.2d at 76.

In *Henry*, 729 S.W.2d at 737, this Court pointed out that requiring the objection to be made before the jury is sworn and the panel is discharged allows the trial court

the option of remedying the violation by either installing the challenged veniremember to the jury or discharging the jury and calling a new array. It was also suggested in *Henry* that when and if a remedy is eradicated, the accompanying timeliness requirements should be modified.

We have examined the legislative history of Texas House Bill 65 and Texas Senate Bill 345, 70th Legislature, and find that in enacting article 35.261, the legislature considered both of the possible remedies suggested in *Henry* and held numerous hearings and debates to determine which remedy was best. Ultimately, they elected to **[863]** have the sole remedy be the call of a new array. This remedy was chosen to eliminate any possible bias toward the State which might exist if the remedy were to seat a venireman whom the State had just struck. The Senate countered House Bill 65, requiring the impanelment of a new array as a remedy, with Senate Bill 345 which would leave it to the trial court's discretion to either call a new array or reseat the improperly struck venireman. *See* Senate Committee on Criminal Justice Debate of Senate Bill 345, February 21, 1989. This bill was defeated and the original House version (House Bill 65) became article 35.261. Thus, the legislature clearly rejected the requirement that the objection be made before the venire is discharged. Art. 35.261(b), V.A.C.C.P.

As we noted in *Henry*, when the only possible remedy is the call of a new array, the objection to the strike need not be lodged before the venire is discharged since the venire will no longer be needed whether the objection

is sustained or not.[2] When the legislature speaks to an issue subsequent to this or any other court's decision on the issue, and the effect of the legislation is to modify existing caselaw, the statute shall control unless it is unconstitutional.[3]

The State alleges that this Court has already interpreted article 35.261 to include the *Henry* time limits and that, since the legislature has not acted to amend the statute to specifically exclude those time requirements, we should continue to apply them.[4] The State relies on this Court's decisions in *Brown v. State*, 769 S.W.2d 565

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[2] We note that in *Sims v. State*, 792 S.W.2d 81 (Tex.Cr.App.1990), this Court held that, although the case was tried after the effective date of article 35.261, we would not address the issue of "whether the Court of Appeals erred in concluding that reinstatement of an improperly excluded venireman to the jury is a permissible remedy under, or in spite of, Article 35.261(b)." *Id.* at 81. Since the defendant in *Sims* had requested at trial that either the juror be reinstated or a new array be called, and had not challenged the Court of Appeals' holding that he invited the error, we were not adequately presented with the issue of whether article 35.261 required that the only remedy be the call of a new array. Because the issue was not presented we dismissed the petition for discretionary review as being improvidently granted.

[3] "It is within a legislature's competence to wipe the slate clean of a judicial precedent regarded as undesirable." Keeton, Venturing To Do Justice (Cambridge, Mass.: Howard University Press, 1969), pp. 95-96.

[4] Appellant noted that there was an attempt made in the 71st legislature to amend article 35.261, V.A.C.C.P. to include the *Henry* limits, but it failed. Clearly, if the legislature had intended to include those limits it would have done so.

(Tex.Cr.App.1989) and *Cooper v. State*, 791 S.W.2d 80 (Tex.Cr.App.1990). But these cases do not support the State's argument. Brown's trial occurred prior to the effective date of article 35.261 and, therefore, *Henry* was applicable to his trial. Although Cooper's trial did occur after the effective date of article 35.261, we noted that the statute was "not mentioned by the parties or the Court of Appeals." *Cooper*, 791 S.W.2d at 81. Thus, we were not called upon to interpret the effect of article 35.261 in that case.

We now hold that *Henry* is inapplicable to the timeliness of any equal protection claim arising from the racially discriminatory exercise of a peremptory challenge after the effective date of article 35.261. Since appellant's trial occurred after the effective date of article 35.261, the provisions of article 35.261 apply. For the objection to be timely it must have been raised "[a]fter the parties . . . delivered their lists . . . and before the court . . . impanelled the jury." Art. 35.261(a), V.A.C.C.P. A jury is considered "impanelled" when the members of the jury have been both selected and sworn. *Price v. State*, 782 S.W.2d 266 (Tex.App. – Beaumont 1989). *See also, Woolls v. State*, 665 S.W.2d 455 (Tex.Cr.App.1983); *Reese v. State*, 151 S.W.2d 828 (Tex.Cr.App.1941).

Here, appellant lodged his objection after the peremptory strike had been delivered and the stricken veniremembers **[865]** excused, but before the jury was sworn. As the Court of Appeals correctly held, appellant met the requirements of article 35.261(a) and, therefore, his objection was timely.

II.
WAS THERE A PRIMA FACIE SHOWING OF RACIAL DISCRIMINATION?

In its second ground for review the State alleges that the Court of Appeals erred in holding that appellant made a prima facie showing of racial discrimination.

The United States Supreme Court recently held that where a prosecutor has articulated the reasons for his allegedly racially discriminatory peremptory challenges "without any prompting or inquiry from the trial court" and "the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). Likewise, this Court has noted that "[a]ppellate review should not become bogged down on the question of whether the defendant has made out a prima facie case [unless the ruling on the prima facie case] stop[s] the fact finding process." *Dewberry v. State*, 776 S.W.2d 589, 591 (Tex.Cr.App.1989) [citing *U.S. v. Forbes*, 816 F.2d 1006, 1010 (5th Cir.1987)].[5] Thus, the policy of this Court, like that of the United States Supreme Court, is that we will

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[5] In *Salazar v. State*, 795 S.W.2d 187 (Tex.Cr.App.1990), this Court addressed the issue of whether a prima facie case had been established because the Court of Appeals had ended the inquiry into the defendant's claim by concluding that it had not been.

not review the issue of whether the defendant established a prima facie case whether the prosecutor has articulated his reasons for the challenged peremptory strike and the trial court has ruled on the ultimate question of intentional discrimination.

In this case the prosecutor articulated all of his reasons for the exercise of his challenged peremptory strike, appellant cross-examined him, and the trial judge entered his finding. Whether the appellant established a prima facie case is a moot issue.

III.
THE STANDARD FOR REVIEW

In its third ground for review the State contends that the Court of Appeals erred by applying an incorrect standard of appellate review. The State asserts that the correct standard of review is "clearly erroneous" and cites as authority *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1871, 114 L.Ed.2d 395 (1991) ("[W]e decline to overturn the state [trial] court's finding on the issue of discriminatory intent unless convinced that its determination was clearly erroneous.").

We have held that the correct standard of review for claims that peremptory strikes were used in a racially discriminatory manner is "clearly erroneous". *Williams v. State*, 804 S.W.2d 95, 101 (Tex.Cr.App.1991); *Tennard v. State*, 802 S.W.2d 678 (Tex.Cr.App.1990); *Whitsey v. State*, 796 S.W.2d 707, 726 (Tex.Cr.App.1989) (opinion on State's motion for rehearing). To determine whether the fact-finder's decision is "clearly erroneous", appellate courts look to the record to see if they are "left with the 'definite

and firm conviction that a mistake has been committed'." *U.S. v. Hernandez*, 887 F.2d 564, 567 (5th Cir.1989); (citing and quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)).

In this case, the Court of Appeals "consider[ed] the evidence in the light most favorable to the trial judge's rulings and determine[d] if those rulings [were] supported by the record." *Hill*, 787 S.W.2d 74 at 77. In so doing, the Court of Appeals relied upon our decision in *Keeton v. State*, **[866]** 749 S.W.2d 861, 870 (Tex.Cr.App.1988), modified by *Whitsey v. State*, 796 S.W.2d 707 (Tex.Cr.App.1989) (opinion on State's motion for rehearing).

We have held that although "clearly erroneous" is the correct appellate standard of review, "supported by the record," the appellate standard we announced in *Keeton*, was analytically and intellectually the same as "clearly erroneous". *Whitsey*, at 722-724 ("adopting the clearly erroneous standard . . . merely extend[s] the 'supported by the record' standard to its ultimate and logical conclusion"); *Williams*, 804 S.W.2d 95.

Since the standard utilized by the Court of Appeals is the functional equivalent of the "clearly erroneous" standard, we cannot say that the Court of Appeals' approach was incorrect. However, we disavow the nomenclature which the Court of Appeals used in its appellate review.

IV.
DID APPELLANT PROVE RACIAL DISCRIMINATION?

After appellant made his objection to the prosecutor's peremptory challenge, the prosecutor testified

before the court that he challenged the venireman "because I felt like he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions."

The State contends that the Court of Appeals' decision effectively creates the rule that, if a prosecutor states that the venireman's race influenced his decision to peremptorily challenge the venireman, the defendant has conclusively proven racial discrimination. But the Court of Appeals wrote,

> we must examine each of the prosecutor's reasons for striking a black potential juror within the circumstances of the particular case to determine whether the "neutral explanation" for the strike is really a pretext for a racially motivated peremptory challenge. . . . We determine that the reasons given by the prosecutor for challenging [the venireman] were unrelated to the case and based on assumptions.

Hill at 78-79.

The State urges that the Court of Appeals should have accepted the prosecutor's reason for the strike: Identity between the venireman and the appellant. The State contends that identification between the venireman and appellate can be a legitimate race-neutral reason for the exercise of a peremptory challenge against the venireman, even if one of the factors relied upon to establish the identity is shared race, so long as there are other nonracial factors which also establish identity. In support of its contention, the State relies on *Lee v. State*, 747 S.W.2d 57 (Tex.App. – Houston [1st] 1988) (pet. ref'd.). In that case the First Court of Appeals held that the prosecutor's

announced reason for the challenge, identity between the venireman and appellant, based on the fact that they were both black males and were only ten years apart in age, was a sufficiently race-neutral reason for the strike. The Court of Appeals wrote, "[a] venireman who is similar in age and might be sympathetic for a defendant can be justifiably excluded from the jury panel." *Id.* at 59. We agree that race may be a factor coexisting with a nonracial reason for a strike, however, race may *not* be the reason for the strike.

Since 1880 the United States Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to apply to jury selection, both grand and petit. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880) (holding a West Virginia statute which prohibited black citizens from serving on grant juries violative of equal protection). The Supreme Court held in *Strauder* that the Fourteenth Amendment mandates that "the law in the States shall be the same for the black as for the white; that all persons . . . shall stand equal before the laws of the States and, . . . that no discrimination shall be **[867]** made against them by law because of their color[.]" *Strauder* at 307, 25 L. Ed. 665. But it wasn't until 1965 that the Supreme Court addressed a claim that equal protection had been denied to a criminal defendant by a prosecutor's use of peremptory strikes. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

In *Swain*, the Court first noted the great role that peremptories play in our system of jurisprudence, and realized that their very purpose is to eliminate prospective jurors for reasons which may be based on feelings,

rather than logic. *See Id.* at 220, 85 S.Ct. at 836 ("[Peremptory challenges are] exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."). The Court then acknowledged that it was possible that prosecutors could use peremptories to discriminate against black citizens, but required, in order for an equal protection claim to be established, proof of more than just the fact that the State exercised peremptory challenges against all the black citizens on one venire. The Court held that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court."[6] *Id.* at 222, 85 S.Ct. at 837. However, the Court also acknowledged that it was possible that the "proof might support a reasonable inference that [black citizens were] excluded from juries for reasons *wholly unrelated to the outcome of the particular case on trial* and that the peremptory system [was] being used to *deny [black citizens] the same right and opportunity to participate in the administration of justice enjoyed by the white population.*" *Id.* at 224, 85 S.Ct. at 838 (emphasis added). If that were the case, the Court would then recognize an Equal Protection claim. Thus, in order to prove a violation of Equal Protection, a criminal defendant was required to show a pattern of invidious discrimination in not just his case, but several cases.

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[6] The Constitution guarantees "freedon from any bias against the accused . . . [and] any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes v. Missouri*, 120 U.S. 68, 71, 7 S.Ct. 350, 351, 30 L.Ed. 578, 580 (1887).

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court was asked to "reexamine that portion of *Swain* . . . concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Id.* at 82, 106 S.Ct. at 1715. In addressing this issue the Court reviewed the history of the Equal Protection Clause.

The Court in *Batson* explained that "the purpose of the Fourteenth Amendment was to put an end to governmental discrimination on account of race." *Id.* at 85-86, 106 S.Ct. at 1716-1717. "Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Id.* at 88, 106 S.Ct. at 1718 (quoting *Strauder* 100 U.S. at 308).

Quoting *Swain* 380 U.S. at 224, 85 S.Ct. at 838, the Supreme Court explained that the Equal Protection Clause makes it "impermissible for a prosecutor to use his challenges to exclude blacks from the jury 'for reasons wholly unrelated to the outcome of the particular case on trial' or to deny to blacks 'the same right and opportunity to participate in the administration of justice enjoyed by the white population' " *Batson* 476 U.S. at 91, 106 S.Ct. at 1720. Further, the Court stated, "our cases concerning selection of the venire reflect the general Equal Protection principle that the 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose' ". *Id.* at 93, 106 S.Ct. at 1721 (quoting *Washington v. Davis*,

426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976)). **[868]**

The overriding intent of the Equal Protection Clause, as interpreted by the Supreme Court and applied to peremptory challenges, is to protect African-Americans from discrimination against them because they are African-Americans, and to guarantee them the same rights as are enjoyed by other citizens.

The Supreme Court in *Batson* made it easier for a criminal defendant to prove that a prosecutor used peremptory challenges in violation of the Fourteenth Amendment that it had been under *Swain*. The Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719. "Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here." *Id.* at 89, n. 12, 106 S.Ct. at 1719, n. 12.

Recently, the Supreme Court recognized and held that the Fourteenth Amendment protects every race against purely racially-motivated exercises of peremptory challenges. *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 1373-1374, 113 L.Ed.2d 411 (1991). Additionally, the Supreme Court has declared that the Equal Protection clause as applied to peremptory challenges also protects prospective jurors in civil trials. *Edmonson v. Leesville Concrete Co.*, ___ U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

The Fourteenth Amendment mandates that all United States citizens called for jury duty shall be treated alike under the law. If a member of any race is struck "for reasons wholly unrelated to the outcome of the particular case on trial or in order to deny to [him/her] the same right and opportunity to participate in the administration of justice enjoyed by [others]" then the Equal Protection clause has been violated. Conversely, if a venireman is struck for reasons related to the case being tried and he would have been struck for that reason regardless of his race, the mere mention of the fact that the venireman is of a particular race does not automatically establish a *Batson* claim.[7]

The Equal Protection clause is designed to protect all citizens from being discriminated against because of their race. It does not protect them from a peremptory challenge levelled against them because of the prosecutor's reasonable belief that they can not be sufficiently impartial in the particular case on which they would sit as a juror. Unless racial discrimination against a venireman is established by the party raising the claim, the Equal Protection Clause is not implicated. Although courts must be cautious in their determination of the prosecutor's intent for the strike when he mentions race, we can conceive of scenarios in which the race of the venireman could be related to the particular case to be tried in such a

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[7] Unlike the concurring opinion, which makes a strong argument for the eradication of the peremptory challenge altogether, which decision rightly belongs in the Legislature, we do not believe that there are magic words which automatically establish a *Batson* claim.

way as to create a biased jury if race were not considered by the litigants in exercising their peremptory strikes.[8] This case does not present such a scenario.

The State alleges that there was "identity" between the venireman and appellant, however, the only evidence of similarity between the venireman and appellant was that they were both black males. The prosecutor did not articulate any other similarity. **[869]**

Batson specifically provides that a "prosecutor may not rebut the defendant's prima facie case of discrimination [based upon the prosecutor's use of peremptory challenges] by stating merely that he challenged jurors of the defendant's race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race." *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, at 89, 106 S.Ct. at 1719.

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[8] In *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), the Supreme Court held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." Since this holding was handed down on the same day as *Batson*, the Court did not mean to exclude this sort of bias from the State's consideration at voir dire. *See also Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).

Thus the alleged identity between the venireman and appellant, based only on the shared sex and shared race of the venireman and appellant, does not escape *Batson's* prohibition against making the assumption that because the defendant and the venireman are of the same race they would identify with each other. If there were other significant similarities between appellant and the venireman, then race might have been one of those similarities which established empathy between appellant and the venireman. The Court of Appeals is correct in holding that this is not sufficient to establish a constitutional, non-race based identity. Insofar as the language of *Lee v. State*, 747 S.W.2d 57, conflicts with this opinion it is expressly disavowed.

The fact that the prosecutor mentioned race as part of his explanation for his peremptory challenge to establish an identity which is not present in indicative of purposeful discrimination in this case, but it is not conclusive. Appellant still must prove racial discrimination. Art. 35.261(a), V.A.C.C.P. In other words, appellant must show that the prosecutor's other explanations for his challenge were merely a pretext for discrimination. *See Whitsey v. State*, 796 S.W.2d 707, 726 (Tex.Cr.App. 1989) (opinion on State's motion for rehearing).

As the Court of Appeals found, the prosecutor stated that he challenged the venireman "because I felt like he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions." *Hill*, at 78. After examining the prosecutor's voir dire of the venireman in its entirety, the Court of Appeals found that it was perfunctory: "there were no meaningful questions asked upon which to challenge a juror." *Id.*

The exchange between the prosecutor and the black venireman who was subsequently struck and about whom the appellee raised his *Batson* claim, consisted of the following:

Prosecutor: Is that [venireman's last name]? Is that right, sir?

Venireman: Uh-huh.

Prosecutor: What do you do for AT&T?

Venireman: I'm a data tech –

Prosecutor: Pardon me?

Venireman: A data technician.

Prosecutor: A data technician? How long – I can barely read that. How long have you been with that company?

Venireman: Twenty years.

Prosecutor: Can you think of any reason why you would not be fair and impartial in this particular case?

Venireman: No.

Prosecutor: Okay.

We agree that the State's voir dire examination of this venireman was perfunctory. We must examine the rest of the prosecutor's reasons for this strike in light of his perfunctory voir dire. *See Whitsey*, 796 S.W.2d at 713. The prosecutor's additional reasons were: "[I] didn't like the way he [the venireman] responded to my questions . . . his attitude, his demeanor."

The only other statements made by the venireman were made in response to appellant's questions. When

asked by appellant's counsel about his prior contact with criminal activity, the venireman responded **[870]** that his coworker had been robbed. He state, however, that knowing the facts of his friend's case would not bias him in any way. When asked if he could give the defendant the benefit of "your individual judgment?" he answered, "without a doubt."

As can be seen from the reproduction of the voir dire, above, there is nothing to suggest that the venireman was hostile to the State. Illustrative of this point, when asked what answers the venireman gave that he didn't like, the prosecutor answered, "I'll have to have them read back to me. I can't remember what they were." Because the prosecutor never mentioned any specific body language, or any other nonverbal actions which led him to believe that the venireman was biased against his case, the record speaks for itself.

Appellant has carried his burden; the prosecutor's race-neutral reasons for the exercise of his strike were pretextual. The trial court's finding that the peremptory challenge was exercised for race-neutral reasons is clearly erroneous. The judgment of the Court of Appeals is affirmed. This cause is remanded to the trial court.

MILLER, J., concurs in result.

BAIRD, Judge, concurring.

I concur with the result reached by the majority; the judgment of the Court of Appeals should be affirmed. However, I write separately to address Part IV. of the majority opinion.

I. THE MAJORITY'S HOLDING

The majority phrases the State's contentions as follows: "The State contends that the Court of Appeals' decision effectively creates the rule that, if a prosecutor states that the venireman's race influenced his decision to peremptorily challenge the venireman, the defendant has conclusively proven racial discrimination." At 866. "The State contends that identification between the venireman and appellant can be a legitimate race-neutral reason for the exercise of a peremptory challenge against the venireman, even if one of the factors relied upon to establish the identity is shared race, so long as there are other nonracial factors which also established identity." At 866. The majority embraces the State's contentions by holding: "The fact that the prosecutor mentioned race as a part of his explanation for his peremptory challenge to establish an identity which is not present is indicative of purposeful discrimination in this case, *but is not conclusive.*[1] . . . [A]ppellant must show that the prosecutor's other explanations for his challenge were merely a pretext for discrimination." At 869.

II. A VIEW FROM THE UNITED STATES SUPREME COURT

The right of a citizen to participate in the administration of justice by serving on a petit jury is a very precious right in our society, second only to a citizen's right to

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[1] Unless otherwise indicated, all emphasis herein is supplied by the author.

participate in our society, second only to a citizen's right to participate in our democratic system by voting. *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 1369, 113 L.Ed.2d 411 (1991).

In *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), the defendant, a "colored man," complained of the State law which provided that no colored man was eligible to be a member of a grand jury or to serve on a petit jury. The controlling question presented in *Strauder* was:

> whether by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color[.]
>
> It is to be observed that [the question] is not whether a colored man, when an **[871]** indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color; but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

Id. at 305.

The Supreme Court deemed the question important because it demanded a construction of the "recent [13th, 14th and 15th] amendments of the Constitution." *Id.* The Court recognized that the 14th Amendment was "designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by

white persons[.]" *Id.* at 306. Under the Court's construction the "recent amendments" were ratified to provide "the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations; implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." *Id.* at 308.

When specifically addressing the statute of which the defendant complained the Court stated:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id. at 308.

The Court concluded that the West Virginia statute's discrimination in the selection of jurors amounted to a denial of equal protection and was, therefore, unconstitutional. *Id.* at 310.

In *Carter v. Texas*, 177 U.S. 442, 444, 20 S.Ct. 687, 688, 44 L.Ed. 839 (1900), a Galveston County defendant filed a motion to quash his indictment because the grand jury commissioners, who appointed the grand jury, excluded "all colored persons or persons of African descent"

because of their race and color. The trial court overruled the motion. The defendant was convicted and sentenced to death. On appeal the defendant did not contend that the law was facially unconstitutional but rather that it was being administered in a discriminatory fashion by the grand jury commissioners who were selecting only whites as grand jurors. Nevertheless, this Court affirmed the judgment of the trial court. *See, Carter v. State*, 39 Tex.Crim. 345, 46 S.W. 236; 39 Tex.Crim. 345, 48 S.W. 508 (Tex.Cr.App.1898) (Appellant's mtn. for reh'g overruled).

In 1890, when the Supreme Court reviewed our *Carter* decision the rules of law which governed the case were already "clearly established" by Supreme Court precedent. *Carter*, 20 S.Ct. at 689.

> Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664; *Neal v. Delaware*, 103 U.S. 370, 397 26 L.Ed. 567, 574; *Gibson v. Mississippi*, 162 U.S. 565, 40 L.Ed. 1075, 16 Sup.Ct.Rep. 904.

Id. at 689.

The Supreme Court found: "The necessary conclusion is that the defendant has been denied a right duly set up and claimed **[872]** by him under the Constitution and

laws of the United States; and therefore *the judgment is reversed . . . " Id.* at 690 (Emphasis in original).

In spite of the decision in *Carter*, fifty years later, the Supreme Court was asked to review the Harris County practice of selecting individuals for grand jury service. In *Smith v. Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940), the defendant complained of the intentional and systematic exclusion of "negroes" from grand jury service. The defendant's timely filed motion to quash the indictment was denied by the trial court and that decision was affirmed by this Court. *See, Smith v. State*, 140 Tex.Crim. 565, 136 S.W.2d 842 (App. 1940). The Texas statutory scheme was capable of being carried out with no racial discrimination. However, because of the wide discretion permissible under the statute it was equally capable of being applied in a discriminatory manner. In *Smith*, two grand jury commissioners testified that "their failure to select Negroes was because they did not know the names of any who were qualified and the other said that he was not personally acquainted with any members of the Negro race." *Smith*, 61 S.Ct. at 166. In reversing the defendant's conviction the Supreme Court held:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

Id. at 165.

In *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950), the defendant attacked the way the statutory method of grand jury selection had been administered by the grand jury commissioners of Dallas County. The defendant contended the commissioners were limiting the number of "Negroes selected for grand-jury service to not more than one on each grand jury." *Cassell*, 70 S.Ct. at 631. The Supreme Court held:

> Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.
>
> *An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race.*

Id.

Holding that a proposal racial limitation was forbidden under the 14th Amendment, *Id.* at 632, the Supreme Court again reversed a judgment of this Court. *See, Cassell v. State*, 154 Tex.Crim. 648, 216 S.W.2d 813 (App.1949).

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) the Supreme Court confronted for the first time the use of peremptory challenges as a device to exclude jurors because of their race. The Court re-stated the principle that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Swain*, 85 S.Ct. at 826.

The question of whether a defendant had met the *Swain* burden of proving purposeful discrimination was re-visited in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct.

1712, 90 L.Ed.2d 69 (1986). The *Batson* court recognized that while many of the earlier decisions by the Supreme Court had "been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury." *Batson*, 106 S.Ct. at 1718. Accordingly, "the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.' " *Id.*, quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 893, 97 L.Ed. 1244 (1953). Therefore, "the State's privilege to strike **[873]** individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause." *Batson*, 106 S.Ct. at 1719.

The *Batson* Court described *Swain* as having placed on defendants a crippling burden of proof which had the effect of immunizing prosecutors from constitutional scrutiny. *Id.* at 1721. Consequently, the *Batson* Court relaxed the *Swain* burden. *Id.* at 1723. After establishing a prima facie case of purposeful discrimination in the selection of the petit jury, the burden shifts to the State to come forward with a "neutral explanation" for challenging black jurors. *Id.* at 1723. When describing the State's burden the Supreme Court held in part:

> . . . Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, [citation omitted] so it *forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on*

> *account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.* Nor may the prosecutor rebut the defendant's case merely be denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' [citation omitted] If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.' [citation omitted] *The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.*

Id. at 1723.

In *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 1366, 113 L.Ed.2d 411 (1991), the Supreme Court reaffirmed the premise "that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." The *Powers* court extended the holding in *Batson* and held that "a criminal defendant may object to race-based exclusion of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." *Id.* Relevant to the issue presented in the case at bar the *Powers* Court held:

> We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. *An individual juror does not have a right to sit on any particular petit jury, but he or*

> *she does possess the right not to be excluded from one on account of race.*
>
> It is suggested that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. *Race cannot be a proxy for determining juror bias or competence.* 'A person's race simply 'is unrelated to his fitness as a juror' '. [citations omitted]. We may not accept as a defense to racial discrimination the very stereotype the law condemns.

Id. 111 S.Ct. at 1370.

The foregoing cases convincingly demonstrate the principle that race shall play *no* part in the jury selection process. The exclusion of minority citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure. *Batson* 106 S.Ct. at 1716. The Equal Protection Clause guarantees the defendant that the State will not exclude members from the jury on account **[874]** of race. *Strauder,* 100 U.S. at 305. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability to consider impartially the evidence presented at trial. *Batson,* 106 S.Ct. at 1718. *A person's race is simply unrelated to his fitness as a juror. Id.*

III. A VIEW FROM TEXAS COURTS

Recently, our sister Court considered a similar issue in *Powers v. Palacios*, 813 S.W.2d 489 (Tex.1991). In *Powers* the plaintiff sought to question the defendant, Palacios, to establish a racially discriminatory use of peremptory strikes. Palacios conceded that race was a factor in his determination to exercise his peremptory strikes. *Id.* at 490. In reversing the judgment and remanding the case for a new trial the unanimous Court held:

> Here, Powers established that opposing counsel had exercised a peremptory challenge discriminatorily. [footnote omitted] Such 'automatic invocation of race stereotypes retards [our] progress [as a multiracial democracy] and causes continued hurt and injury.' *Edmonson [v. Leesville Concrete Co., Inc.]*, ___ U.S. at ___, 111 S.Ct. at 2088. *We hold that equal protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror.*

Id. at 491.

A similar issue was addressed by the First Court of Appeals in *Speaker v. State*, 740 S.W.2d 486 (Tex.App. – Houston [1st Dist.] 1987). The *Speaker* Court held:

> In this case, the trial court never reached the point of a factual determination of whether purposeful discrimination had been proven because the prosecutor's explanation of his peremptory strikes was facially inadequate as a matter of law. At the hearing on the motion for new trial, the prosecutor admitted:
>
> > Although race is a factor I do consider, it is not an overriding factor and it was not an

> overriding factor in Mr. Speaker's trial in the selection of these jurors.
>
> While the prosecutor's candor is commendable, his statement clearly shows that he considered race a factor while selecting the jurors in the appellant's trial. This basis for juror selection has traditionally been condemned. *See Cassell v. Texas*, 339 U.S. 282, 287, 70 S.Ct. 629, 632, 94 L.Ed. 839 (1950) ([a]n accused is entitled to have the charges against him considered by a jury in the selection of where there has been neither inclusion nor exclusion because of race). *While we realize that it may be unrealistic to expect the prosecutor to put aside every improper influence when selecting a juror, we conclude that that is exactly what the law requires. Thus, a prosecutor's admission that race was an influencing factor in the selection process vitiates the legitimacy of the entire procedure. See Batson* 106 S.Ct. at 1719; *Neal v. Delaware*, 103 U.S. (Otto) 370, 397, 26 L.Ed. 567 (1881).

Speaker, 740 S.W.2d at 489.

A similar issue arose in *McKinney v. State*, 761 S.W.2d 549, 551 (Tex.App. – Corpus Christi 1988) where the State admitted that race was not *the reason* but was *a factor* in peremptorily challenging the black venireman. *Id.* at 550. Emphasis in original. Judge Benavides, then a Justice on the Corpus Christi Court of Appeals, held:

> In the case before us, the prosecutor did not rebut the appellant's prima facie case of discrimination by articulating a neutral explanation for the peremptory strike, but rather confirmed the discrimination by admitting that race was a factor in striking Evans. No "neutral explanation"

> can serve to rebut the presumption that the condemned practice of exclusion based on race occurred when the prosecutor admits that such an exclusion did occur. . . .

McKinney, 761 S.W.2d at 551. [875]

The majority, while failing to mention or distinguish *Powers*, *Speaker*, or *McKinney*, holds "that race may be a factor contributing to a non-racial reason for the strike, however, race may *not* be the reason for the strike." At 866. Such a holding fails to recognize that the Equal Protection Clause *forbids* the State to strike minority veniremen "on the assumption that they will be biased in a particular case *simply because*" the defendant is also a minority. *Batson*, 106 S.Ct. at 1723.

The majority reads this opinion as "mak[ing] a strong argument for the eradication of the peremptory challenge altogether." At 868, n. 7. I strongly disagree. No one who has participated in the selection of a jury can discount the importance of the peremptory challenge. Indeed, we have elevated the intelligent use of peremptory challenges to a Constitutional right. *See, Naugle v. State*, 118 Tex.Crim. 566, 40 S.W.2d 92, 94 (App. 1931). However, that right is "subject to the commands of the Equal Protection Clause." *See, Batson*, 106 S.Ct. at 1719. Therefore, while the right to peremptorily challenge a venire member is important, its importance is clearly outweighed when the peremptory challenge is used to deny, on the basis of race, a citizen's Constitutional right to participate in the administration of justice by serving on a jury. Discrimination has no place in the qualification or selection of jurors and offends the dignity of the individuals and the integrity of the Court. *Powers*, 111 S.Ct. at 1366. The Equal

Protection Clause extends to all citizens the rights and privileges of serving as a juror. Therefore, while the human condition will probably continue to fight for the freedom to discriminate, the justice system must not provide a means to that end. *See*, Garcia, *Strike Three and It's Out – There Goes the Peremptory*, The Houston Lawyer, November-December 1991, at 22.

IV. ESTABLISH A BRIGHT LINE RULE

I would remain true to the clear intent and purpose of more than a century of established precedent from the United States Supreme Court. We should adopt the holdings in *Speaker*, *McKinney*, and *Powers* and immediately establish the following "bright line" rule: equal protection is denied whenever race is a factor in the exercise of a peremptory challenge. This "bright line" rule is necessary because one simply cannot articulate a "race-neutral" explanation for exercising a peremptory strike when race is a part of that explanation.

With these comments I concur in the results reached by the majority.

CLINTON, OVERSTREET and BENAVIDES, JJ., join this opinion.

[787 S.W.2d 74]

Michael Lee HILL, Appellant,

v.

The STATE of Texas, Appellee.

No. 05-88-01234-CR.

Court of Appeals of Texas, Dallas.

Jan. 18, 1990.

Rehearing Denied Feb. 21, 1990.

Discretionary Review Granted
May 30, 1990.

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[75]

Lawrence G. Boyd, Dallas, for appellant.

Jeffrey B. Keck, Dallas, for appellee.

Before HOWELL, BAKER and OVARD, JJ.

OPINION ON MOTION FOR REHEARING

OVARD, Justice.

That State's motion for rehearing is denied. Our opinion of July 31, 1989 is withdrawn and this opinion issued in lieu thereof.

A jury convicted Michael Lee Hill of aggravated robbery and assessed punishment at sixty years' confinement. In his sole point of error, Hill contends that the trial court erred in overruling his objection to the State's use of a peremptory challenge. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Hill argues that the State improperly struck a venire-member based on racial

grounds, thereby violating *Batson* and article 35.261(a)[1] of the Texas Code of Criminal Procedure. Because we agree, we reverse and remand this case.

Following voir dire, a list of the twelve selected jurors was prepared, and the trial court announced their names. The trial court dismissed the venire and directed the twelve jurors into the jury room. Hill then objected, moved that the jury be dismissed, and called for a new array. The State did not object to this request as being untimely. Hill based his request for a *Batson* hearing under article 35.261 on the fact that he was black and that the only venire-member struck by the State was black. The trial court apparently determined that a prima facie case of discrimination had been established because it directed the prosecutor to offer race-neutral explanations for the State's peremptory challenges. When the prosecutor concluded his explanations, the trial court overruled Hill's objection. The jury was then sworn.

The initial question we must resolve is whether Hill's *Batson* challenge was timely raised after the twelve jurors' names were called and the venire dismissed, but before the jury was sworn. In support of its argument that the objection to the jury selection process was untimely, the State relies upon *Henry v. State*, 729 S.W.2d 732, 737 (Tex.Crim.App.1987), in which the court of criminal appeals declared prospectively:

> [A] defendant may make a timely objection within the *Batson* lines if such objection is made

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[1] Hereafter, all references to article 35.261 are to Tex.Code Crim.Proc.Ann. art. 35.261 (Vernon 1989).

> after the composition of the jury is made known but *before* the jury is sworn and the venire panel is discharged. It is at this time that the trial court has a number of options to correct any error discovered in a *Batson* hearing (including disallowing a prosecutor's strike and installing a minority member on the jury, should the court deem that to be the appropriate remedy, or discharging the jury and convening another venire panel, which might also be deemed appropriate in a given case). **[76]**

Id. at 737. The State argues that, under the *Henry* rule, Hill's objection, first made after the venire was excused, was untimely because it precluded the trial court from curing any error by disallowing one or more of the State's strikes and seating other jurors from the venire.[2]

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[2] The State also relies on the pre-*Henry* case of *Price v. State*, 726 S.W.2d 611, 612-13 (Tex.App. – Houston [14th Dist.] 1987, no pet.), in which the appellate court applied the same rule later prescribed in *Henry*, albeit for a different reason, and concluded that defendant's objection was untimely. In *Price*, the court reasoned that a defendant must object before the venire is excused because, without the venire still before him, a later objection prejudices the prosecutor's ability to give racially neutral reasons for his challenges. *Id.* at 612-13.

We are not persuaded by the *Price* rationale that the prosecutor may be prejudiced by having to offer racially neutral reasons for the exercise of his strikes after the venire is discharged because he can no longer associate names and faces. Typically, in this jurisdiction, attorneys exercise their strikes outside the presence of the venire. If counsel can exercise their strikes without associating names and faces, they can explain them under the same conditions. Moreover, in the case at bar, the State indicated no need for again observing the struck venire members.

(Continued on following page)

Henry, however, no longer governs the timeliness of a challenge. Following the *Henry* decision, the Legislature enacted article 35.261 of the Texas Code of Criminal Procedure, which states in pertinent part:

> (a) After the parties have delivered their lists to the clerk . . . and before the court has impanelled the jury, the defendant may request the court to dismiss the array and call a new array in the case. . . .
>
> (b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

The *Henry* rule that a timely objection must be made "before the jury is sworn and the venire panel is discharged" has been replaced by the article 35.261(a) requirement that an objection, to be timely, must be made "before the court has impanelled the jury." The issue we must resolve is whether the jury was impanelled when the venire was discharged, or, alternatively, whether the jury was impanelled when it was sworn.

(Continued from previous page)

We further note that the remedy afforded by *Henry* was abatement for the limited purpose of determining if the prosecutor possessed a racially neutral explanation for the strikes. *Henry*, 729 S.W.2d at 737. *Henry* implies a finding that a prosecutor should be able to explain the basis of the peremptory strikes at a subsequent hearing. The reasoning in *Price* has been severely diminished by *Henry*.

Impanelling is not defined by article 35.261; however, Texas law has long held that impanellment, at least impanellment by "the court," is not complete until those who are chosen to serve has been both selected and sworn. *See, e.g., Woolls v. State,* 665 S.W.2d 455, 467 (Tex.Crim.App.1983), *cert. denied,* 468 U.S. 1220, 104 S.Ct. 3592, 82 L.Ed.2d 889 (1984) (jury not impanelled until sworn as a body); *Reese v. State,* 142 Tex.Crim. 254, 266-67, 151 S.W.2d 828, 835 (1941) (impanelled implies grand jurors sworn); *Howard v. State,* 80 Tex.Crim. 588, 591-92, 192 S.W. 770, 772 (1917) (jury not impanelled until sworn); *Stephens v. State,* 33 Tex.Crim. 101, 102, 25 S.W. 286, 286 (1894) (jury not impanelled until sworn); *Rippey v. State,* 29 Tex.App. 37, 42-44, 14 S.W. 448, 449 (1890) (jury not impanelled until sworn as a body); *see also* B. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 212 (1987).

Of course, none of these cases are directly on point because the *Batson* rule is of recent vintage and article 35.261 is of even more recent vintage. What is apparent, however, is the the *Henry* rule, to the effect that *Batson* challenges must precede the dispersal of those who will not serve, has no further validity. The basis for this part of the *Henry* rule has been eliminated by 35.261 which declares that a new venire must be called in all instances where the *Batson* challenge is sustained. The State directs our attention to *Brown v. State,* 769 S.W.2d 565, 568 (Tex.Crim.App.1989), and *Green v. State,* 771 S.W.2d 576, 576-77 (Tex.App. – Houston [14th dist.] 1989, no pet.), to support its position that a *Batson* issue must be raised prior to the panel's dismissal. The trial in *Brown* occurred **[77]** prior to the effective date of article 35.261. In *Green,* article 35.261 was not even considered by the court; nor

does the opinion reflect the date of the trial. Therefore, neither of these cases is dispositive of this issue.

We determine that the reasonable rule, comporting with the longstanding interpretation of "impanelled" by the court of criminal appeals, and comporting with fairness to all parties, must be that a *Batson* challenge is not barred as long as it is presented before the jury is sworn. A jury selection process has not reached its logical conclusion until the oath has been administered. At this moment, another phase of the trial commences. The *Batson* deadline must be clear and understandable. To follow the longstanding rule that impanellment is not complete until the jurors are sworn assures that the defendant and his attorney will have a fair opportunity to observe each of the twelve who have been selected and to determine whether any of the State's strikes have been applied against persons of the same race as the defendant. Until he has this information, the defendant has no basis for a *Batson* challenge. We conclude that the swearing of the jury provides the most reasonable, definitive point for a *Batson* challenge under article 35.261.

We now consider Hill's *Batson* claim. In determining whether appellant's rights have been violated under *Batson*, the standard of review to be applied is whether purposeful discrimination was established. *Keeton v. State*, 749 S.W.2d 861, 867 (Tex.Crim.App.1988) (*Keeton II*). We must consider the evidence in the light most favorable to the trial judge's rulings and determine if those rulings are supported by the record. If the record supports the findings of the trial court, they will not be disturbed on appeal. *Keeton II*, 749 S.W.2d at 870.

In order to invoke the protection set forth in *Batson*, a defendant must raise an inference of purposeful discrimination and the trial court must determine that a prima facie case of discrimination exists by virtue of the State's use of its peremptory challenges. A defendant may establish this by showing:

1. that he is a member of a cognizable racial group;
2. that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the venire (peremptory challenges constitute a jury selection practice which permits those to discriminate who are of a mind to discriminate); and
3. these facts and any other relevant circumstances which raise an inference that the prosecutor used peremptory challenges to exclude the veniremen on account of their race.

Batson, 476 U.S. at 96, 106 S.Ct. at 1723; *See Keeton v. State*, 724 S.W.2d 58, 65 (Tex.Crim.App.1987) (*Keeton I*); *see also* TEX.CODE CRIM.PROC.ANN. art. 35.261(a) (Vernon 1989).

The record reflects that Hill is black. At the conclusion of voir dire, but before the jurors were sworn, Hill's attorney made the following objection:

> Pursuant to the Code of Criminal Procedure, Article 35.261, I'd like the record to reflect and the Court to take judicial notice that the client – my client, Michael Lee Hill, is a black man and . . . I'd also like the Court to judicially notice that James Lastun was Juror No. Four, who is a black man, and he was peremptorily challenged by the State of Texas.

The judge took judicial notice of the race of both Hill and Lastun.

Among the factors that can be used to raise an inference of discrimination are "the type and manner of questions directed to the challenged juror, including a lack of questions or a lack of meaningful questions." *Keeton II*, 749 S.W.2d at 867. The State's entire voir dire of Lastun consisted of the following:

> STATE: Is that Lastun? Is that right, sir?
>
> LASTUN: Uh-huh.
>
> STATE: What do you do for AT & T?
>
> LASTUN: Im a data tech –
>
> STATE: Pardon me?
>
> LASTUN: A data technician.
>
> STATE: A data technician? How [78] long – I can barely read that. How long have you been with that company?
>
> LASTUN: Twenty years.
>
> STATE: Can you think of any reason why you would not be fair and impartial in this particular case?
>
> LASTUN: No.
>
> STATE: Okay.

In our view, this demonstrates only a perfunctory examination of Lastun; there were no meaningful questions asked upon which to challenge a juror. Consequently, we hold the record reflects that Hill raised an inference of purposeful discrimination and the trial judge determined

that a prima facie case of discrimination was established. The burden then shifted to the State to come forward with racially neutral explanations as to why peremptory challenges were exercised against veniremen of the same cognizable racial group as defendant. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723; *Keeton I*, 724 S.W.2d at 65; *see* TEX.CODE CRIM.PROC.ANN. art. 35.26(a) (Vernon Supp.1989). The trial judge conducted such a hearing, requiring the prosecutor to state his reasons for exercising a peremptory challenge against Lastun. *See Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. When asked by the trial court to give a racially neutral explanation, the prosecutor replied, "Your Honor, I struck Mr. Lastun because I felt he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions."[3] When Hill's attorney asked the prosecutor which of Lastun's answers he did not like, the prosecutor replied, "I'll have to have them read back to me. I can't remember what they were, but I just didn't like the way he responded to my questions, his attitude, his demeanor." In overruling the *Batson* objections, the trial court impliedly found that the prosecutor had presented a racially neutral explanation.

> The trial judge cannot merely accept the specific reasons given by the prosecutor at face value, the judge must consider whether the facially neutral explanations are contrived to avoid

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[3] The prosecutor's explanation rings similar to the blatant constitutional violation condemned where the prosecutor stated, "I struck that prospective juror because he is black." *See Whitsey v. State*, No. 1121-87 slip op. at 7 (Tex.Crim.App. May 10, 1989).

admitting acts of group discrimination. This evaluation by the trial judge is necessary because it is possible that an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding to strike the juror.

Keeton II, 749 S.W.2d at 868.

Factors that weigh heavily against the legitimacy of a racially neutral explanation given by a prosecutor include: no examination or only a perfunctory examination of the challenged juror and a reason given for the challenge which is unrelated to the facts of the case. *Keeton II*, 749 S.W.2d at 866. In reviewing the trial court's decision, we must consider the evidence in the light most favorable to the trial judge's rulings and determine whether those rulings are supported by the record. If the record supports the trial court's findings, we will not disturb those findings on appeal. *Id.* at 870. However, we must examine each of the prosecutor's reasons for striking a black potential juror within the circumstances of the particular case to determine whether the "neutral explanation" for the strike is really a pretext for a racially motivated peremptory challenge. *Keeton II*, 749 S.W.2d at 868. In making this determination, we must ascertain whether the prosecutor has articulated a "clear and reasonably specific" explanation of "legitimate reasons" for striking the black veniremember. *Batson*, 476 U.S. at 97-98, 98 n. 20, 106 S.Ct. at 1723-24, 1724 n.20. Otherwise, the prosecutor's explanation is not sufficient to overcome defendant's prima facie showing of purposeful discrimination.

Justice Powell stated in *Batson* that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption or his intuitive judgment that they would be partial to the defendant because of their shared race. . . . " *Batson*, 476 U.S. at 95, 106 S.Ct. at 1722. Guided by the aforementioned rules, we determine that the reasons **[78]** given by the prosecutor for challenging Lastun were unrelated to the case and based on assumptions. The exclusion of even one member of appellant's race from the jury for racial reasons invalidates the entire jury selection procedure and entitles a defendant to a new trial. *Keeton II*, 749 S.W.2d at 871 (Teague, J., concurring).

The record does not support the trial court's ruling. Therefore, we conclude that the prosecutor failed to present racially neutral explanations to rebut Hill's prima facie case of purposeful discrimination against Lastun. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723; *Keeton I*, 724 S.W.2d at 65.

We reverse and remand this case for a new trial before a jury that is selected in a racially neutral manner.

[SEAL] OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

April 15, 1992

COA#: 05-88-01234-CR

RE: Case No. 0347-90
STYLE: Hill, Michael Lee

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

[SEAL] OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

May 4, 1992

COA#: 05-88-01234-CR

RE: Case No. 0347-90
STYLE: Hill, Michael Lee

ON THIS DAY THE STATE'S SECOND MOTION FOR REHEARING HAS BEEN DISMISSED.

Thomas Lowe, Clerk

[SEAL] OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

May 29, 1992

COA#: 05-88-01234-CR

RE: Case No. 0347-90
STYLE: Hill, Michael Lee

On this day the State's Motion to Recall the Mandate has been DENIED.

Thomas Lowe, Clerk

(SEAL)

Office of the Attorney General

State of Texas

DAN MORALES
ATTORNEY GENERAL

April 27, 1992

Mr. Jeffrey B. Keck
Assistant District Attorney
Frank Crowley Courts Bldg.
133 N. Industrial Boulevard-LB 19
Dallas, Texas 75207-4313

Re: *Hill v. State*

Dear Jeff:

This letter is (1) to inform you that our office has decided not to seek review in the above referenced case and (2) to authorize your office to seek certiorari review.

If you have any questions, do not hesitate to call me at (512) 463-2080.

Yours truly,

/s/ Charles
CHARLES A. PALMER
Assistant Attorney General
Assistant Chief, Criminal Law
Enforcement Division

CAP/kh

512/463-2100 P.O. BOX 12548 AUSTIN, TEXAS
78711-2548

AN EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER

BATSON HEARING

[p. 2] October 4, 1988 – Afternoon Session (Cont.)

PROCEEDINGS

(Trial jury selected and impaneled, after which following proceedings had in open court.)

THE COURT: Ladies and gentlemen of the jury, before we go any further, we'll have to have a short hearing. I'm going to ask you to go back in that jury room right through that door. The twelve of you go right in there.

(Jury retired from courtroom, after which following proceedings had outside presence and hearing of jury.)

THE COURT: Okay, Mr. Boyd. Do you have a motion to make to the Court?

MR. BOYD: Yes, Your Honor. Pursuant to the Code of Criminal Procedure, Article 35.261, I'd like the record to reflect and the Court to take judicial notice that the client – my client, Michael Lee Hill, is a black man and that –

THE COURT: I don't know whether I can notice that or not. He doesn't look very black to me.

[p. 3] Are you a black man, Mr. Hill?

THE DEFENDANT: Yes, sir, I am.

THE COURT: Go ahead.

MR. BOYD: I'd also like the Court to judicially notice that James Lastun was Juror No. four, who is a

black man, and he was peremptorily challenged by the State of Texas.

THE COURT: James Lastun. All right.

Mr. Pickett, would you like to offer any racially neutral explanation why the State used a peremptory on Mr. Lastun?

MR. PICKETT: Your Honor, I struck Mr. Lastun because I felt like he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions.

THE COURT: Okay. That's an explanation. Do you have anything further, Mr. Boyd?

MR. BOYD: Well, Your Honor, may I ask the prosecutor a couple of questions?

THE COURT: All right. Go ahead.

MR. BOYD: What questions did you not like the answers to?

MR. PICKETT: I'll have to have them read back to me. I can't remember what they were, but I just didn't like the way he responded to my questions, his attitude, his demeanor.

[p. 4] THE COURT: Well, I don't know whether it's necessary for him to identify which questions and which answers he didn't like.

MR. BOYD: Now, you did ask him if he could be fair and impartial, and he did respond that he could be; is that correct?

MR. PICKETT: As did everybody that qualified on the jury.

MR. BOYD: Okay. Your Honor, I believe that the prosecutor's reason already contained a racially motivated reason for excluding him. He said it was because he was black, was one of the things that he said, and I would like to move that the Court dismiss the array and call a new array in the case.

THE COURT: That motion is denied. I overrule your objection.

Bring the jury in. We'll swear them in.

MR. PICKETT: Is there another one?

THE COURT: Anything further?

MR. BOYD: No, that's it.

THE COURT: This was just one that you struck.

MR. PICKETT: Your Honor, I would like the record to reflect that there are two black women sitting on this jury.

THE COURT: Okay. The record will so reflect.

MR. PICKETT: Thank you.

[p. 5] THE COURT: Bring the jury in.

(Jury returned into open court and following proceedings in the presence and hearing of the jury.)

THE COURT: Ladies and gentlemen, would you each hold up your right hands?

RELEVANT STATUTES

At the time of Hill's trial the provisions of TEX. PENAL CODE ANN and TEX. CODE CRIM. PROC. ANN read as follows:

Texas Penal Code provisions:

§ 29.02. Robbery

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code[1] and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

§ 29.03. Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:

(1) causes serious bodily injury to another; or

(2) uses or exhibits a deadly weapon.

(b) An offense under this section is a felony of the first degree.

Texas Code of Criminal Procedure provisions:

Art. 35.10. Court to Try Qualifications

When no challenge to the array has been made, or if made, has been over-ruled, the court shall proceed to try the qualifications of those present who have been summoned to serve as jurors.

Art. 35.11. Preparation of List

The trial judge, upon the demand of the defendant or his attorney, or of the State's counsel, shall cause the names of all the members of the general panel drawn or assigned as jurors in such case to be placed in a receptacle and well-shaken, and the clerk shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such case, and such names shall be written, in the order drawn, on the jury list from which the jury is to be selected to try such case, and write the names as drawn upon two slips of paper and deliver one slip to the State's counsel and the other to the defendant or his attorney.

Art. 35.14. A Peremptory Challenge

A peremptory challenge is made to a juror without assigning any reason therefor.

Art. 35.15. Number of Challenges

* * *

(b) In non-capital felony cases, the State and defendant shall each be entitled to ten peremptory challenges.

If two or more defendants are tried together each defendant shall be entitled to six peremptory challenges and the State to six for each defendant.

Art. 35.17. Voir Dire Examination

1. When the court in its discretion so directs, except as provided in Section 2, the state and defendant shall conduct the voir dire examination of prospective jurors in the presence of the entire panel.

* * *

Art. 35.25. Making Peremptory Challenge

In non-capital cases and in capital cases in which the State's attorney has announced that he will not qualify the jury for, or seek the death penalty, the party desiring to challenge any juror peremptorily shall strike the name of such juror from the list furnished him by the clerk.

Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.

Art. 35.26. Lists Returned to Clerk

(a) When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk. Except as provided in Subsection (b) of this section, the clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been stricken. If the case be in the county court, he shall call off the first six names on the lists that have not been stricken. Those whose names are called shall be the jury.

(b) In a capital case, the court may direct that two alternate jurors be selected and that the first fourteen

names not stricken be called off by the clerk. The last two names to be called are the alternate jurors.

Art. 35.261. Peremptory Challenges Based on Race Prohibited

(a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impanelled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

(b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

EDITOR'S NOTE:

THIS BOOK ENDS IN MID-SENTENCE. AS ALL OTHER AVAILABLE COPIES ARE LIKEWISE, THIS IS THE BEST AVAILABLE COPY AT THIS TIME.

IF A COMPLETED COPY CAN BE OBTAINED, WE WILL REISSUE.

Supreme Court, U.S.
FILED
AUG 27 1992
OFFICE OF THE CLERK

(2)

NO. 92-198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

THE STATE OF TEXAS,
Petitioner

VS.

MICHAEL LEE HILL,
Respondent

BRIEF IN OPPOSITION TO THE STATE'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF IN OPPOSITION

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FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES MICHAEL LEE HILL, Respondent herein, by and through his attorney, Lawrence G. Boyd, and files this his brief in Opposition, subject only to his Motion to Proceed in forma pauperis.

OBJECTIONS TO JURISDICTION

I.

THE STATE'S PETITION FOR WRIT OF CERTIORARI IS NOT TIMELY, SINCE IT WAS FILED IN EXCESS OF NINETY DAYS AFTER THE DENIAL OF ITS MOTION FOR REHEARING

The opinion of the Court of Criminal Appeals was entered on January 8, 1992. On January 29, 1992, the State filed its motion for rehearing, which was "denied" without further opinion on April

15, 1992. The State attempted to file a second motion for rehearing on May 4, 1992, which was "dismissed" that same day. This Court will note the difference between the rulings of the Court of Criminal Appeals on the two motions. Note carefully that the State's first Motion for Rehearing was "denied" without any further opinion [emph.]. Motions for Rehearing in the Court of Criminal Appeals are governed by the following relevant portions of the Texas Rules of Appellate Procedure:

> (a) A motion for rehearing may be filed with the Clerk of the Court of Criminal Appeals within 15 days after the initial opinion or order is delivered, unless the time is shortened or enlarged by the court. However, no motion for rehearing will be received from an order granting discretionary review.

T.R.A.P. Rule 230(a) (Vernon 1990). Thus, the rules provide for an initial Motion for Rehearing within fifteen (15) days following the delivery of the court's initial opinion. The State has conceded that this initial motion was denied without further opinion [emph.] on April 15, 1992. The rules governing a second, or subsequent, motion for rehearing are set forth, as follows:

> (c) If five members of the Court are of the opinion that a rehearing should be granted in whole or in part, the motion will be granted and the cause will be thereafter set for submission to the court. Otherwise, the motion for rehearing will be denied.
>
> * * *
>
> (f) If the court delivers an opinion on rehearing which changes the disposition of the cause from that on original submission, the losing party may file a motion for rehearing within 15 days after said opinion is delivered. In such event, the procedures outlined in (a) through (e) above will be followed.

T.R.A.P. Rule 230(c), (f) (Vernon 1990). The State's initial Motion for Rehearing was denied without resubmission, oral argument or further opinion [emph.] on April 15, 1992. The rule governing

second, or subsequent, motions for rehearing, provides that such motions may be filed only "if the court delivers an opinion on rehearing which changes the disposition of the cause from that on original submission." Id. No opinion on rehearing was delivered at all. The State's second Motion for Rehearing was a legal nullity. It had no support in the Texas Rules of Appellate Procedure at all. This is why it was "dismissed" and not "denied".

The State's second motion for rehearing would not have been timely filed if an opinion had been delivered in connection with its initial motion for rehearing. We have no evidence before us that the second motion for rehearing, which was filed on a date greater [emph.] than 15 days after the court's April 15th ruling on the State's initial motion, was filed in compliance with the rule governing timely filing by mail. T.R.A.P. Rule 4(b) (Vernon 1990). In any event, since no authority existed for the second motion for rehearing, the benchmark date for filing the State's Petition for Writ of Certiorari commenced on April 15, 1992, not on May 4, 1992, as the State's representative urged in its Petition for Writ of Certiorari.

The significance of the "dismissal" of the State's unauthorized second motion for rehearing on the very date that it was untimely filed was evidently lost on the State's representative. The Mandate of the Court of Criminal Appeals issued on May 1, 1992, fifteen days following its ruling on the "final" [emph.] State's Motion for Rehearing, the one which was "denied" on April 15, 1992. The State's illegitimate "Motion to Recall Mandate" is attached hereto as Respondent's first exhibit. This motion, which has no legal significance, reveals that the

State saw that its second Motion for Rehearing had been "dismissed" but did not comprehend this fact until May 26, 1992. The State's representative has obviously never comprehended the reason for the summary "dismissal" of the second motion, because it was untimely and utterly without support in the rules of appellate procedure. The State's "Motion to Recall the Mandate" was likewise a legal nullity since T.R.A.P. rule 232 provides only for a Motion to Stay the Mandate for not more than sixty (60) days which must be filed within fifteen (15) days following the denial of the State's original Motion for Rehearing. T.R.A.P. Rules 231 and 232 (Vernon 1990). No Texas authority exists for the recall of a Mandate once it is issued. The time for filing the State's Petition for Writ of Certiorari had commenced to run on April 15, 1992. It would run out on July 14th, 1992.

The rules of this Court provide that the State's Petition for Writ of Certiorari should have been filed within 90 days after the entry of the judgment of the Court of Criminal Appeals. Sup.Ct.R. 13.1 (1990). Since an original motion for rehearing was filed, the time to commence the 90-day period for filing the State's Petition for Writ of Certiorari was extended until the "denial" [emph.] of its original motion for rehearing on April 15, 1992. Sup.Ct.R. 13.4 (1990). The final date on which the State could have timely filed its Petition for Writ of Certiorari was July 14, 1992. The Clerk of this Court is required to refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time. Sup.Ct.R. 13.3 (1990). Objections to the jurisdiction of this Court shall be included in the Brief in Opposition. Sup.Ct.R. 15.4 (1990). Since the State's Petition for Writ of Certiorari did not

even purport to be filed by mail until July 29, 1992, it was not timely filed. Sup.Ct.R. 29.2 (1990).

II.

THE STATE'S PETITION FOR CERTIORARI FAILS TO SEEK RELIEF OF THE TYPE PERMITTED OR CONTEMPLATED BY 28 U.S.C. § 1257 BECAUSE NOWHERE DOES THE STATE CHALLENGE THE CONSTITUTIONALITY OF ANY TEXAS STATUTE OR TEXAS COURT'S RULING; NOR DOES THE STATE ARGUE THAT ANY TEXAS STATUTE OR TEXAS COURT'S RULING IMPERMISSIBLY CONFLICTS WITH FEDERAL LAW.

The State's petition for certiorari should be denied by this Court because the issues that the State would have this Court review fall outside the scope of the proper jurisdiction Congress has conferred upon this Court through 28 U.S.C. § 1257. 28 U.S.C. § 1257. Careful examination of each of the State's Questions Presented and Reasons for Review will readily reveal that nowhere within them does the State's representative frame any issue in a manner appropriate for consideration by this Court.

Ostensibly, the State's representative would obtain jurisdiction in this Court through 28 U.S.C. § 1257(a), which, in pertinent part, confers jurisdiction upon this Court to review state court decisions

> [W]here the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

Indeed, the state seeks to have this Court reverse the decision of the Texas Court of Criminal Appeals. But, precisely, for what reason? On what <u>type</u> <u>of</u> grounds? Nowhere in its brief does the State argue, even in passing, that either the Texas court's decision <u>or</u> the state statute analyzed therein (that is, art.

35.261) violates, or is repugnant to, the United States Constitution, the decisions of this Court, or the laws of the United States.

Not one of Petitioner's six Questions Presented and corresponding Reasons for Review fulfills the statutory requirements for this Court to review this case. In its brief, the State challenges neither the constitutionality, nor the congruence with Federal law, of art. 35.261 and the Texas court's decision. Instead, the State seeks to employ this Court as a mere court of appeals or errors. The state would have this Court decide not constitutional law issues but secondary, technical, and policy-oriented ones concerning various aspects of the application of state law.

None of the issues raised in the State's brief impinges upon or directly addresses the adequate and proper enforcement of Constitutional guarantees or Federal laws. Each of these issues--e.g., the existence of a prima facie case, the precise sequence and procedure states may implement to challenge improper peremptory challenges, the methodology appellate courts should use in reviewing trial court decisions--occupies the realm of state law and procedure. In fact, given that in Batson this Court specifically noted that the states were free to establish their own procedures in this area, the only scenario in which a petitioner could properly challenge these procedures in this Court would be one in which the state had enacted measures that failed to meet the Batson standards. The State, obviously, would lack interest in making such an argument, and, quite naturally, does not make the attempt.

No state may permit its police, courts, or laws to provide a level of protection inferior to that which the Federal Constitution guarantees. It is well established, however, that the states do enjoy the option to provide greater levels of protection if they wish. As this Court put it in Oregon v. Hass, 420 U.S. 714 (1974),

> a state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon Federal Constitutional standards...[but a state cannot] impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them. (Emphasis added.)

Hass, 420 U.S. 714, 719 (1974).

In the case at bar, the State of Texas has imposed, through article 35.261 and the subsequent judicial analysis, a form of protection in the wake of Batson that simply enhances the basic, minimum level of federally mandated equal protection of the laws that this Court deemed required by the Constitution. The Texas Court of Criminal Appeals has duly construed a Texas statute in a manner that does not derogate federal law; hence, no need exists for this Court to second-guess the Texas Court's judgment, even if the Texas procedure were costly, time-consuming, and unwieldy--a view the State's representative stands almost alone in expounding.

Were this Court to grant certiorari in this case, it would fall afoul of a fundamental principle of Constitutional adjudication--that, wherever possible, this Court should avoid finding federal questions upon which to rule. Although the State purports to raise questions concerning the interpretation of Batson, all of the issues the State raises really concern Batson itself very little; rather, they take issue with the Texas Court's interpretation of the application of its (indisputably)

constitutional statute.

Even assuming, arguendo, that the Texas Court of Criminal Appeals has interpreted art. 35.261 in a broad manner that (supposedly) will be arduous or perhaps unwieldy to implement at the trial level (a highly dubious notion), none of that should concern this Court. In a remarkably relevant passage, this Court once refused to reverse the California Supreme Court, holding instead that

> [a]t times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds.

Black v. Cutter Laboratories, 351 U.S. 292 (1956). (Emphasis added.)

In the case at bar, the State seeks review of state--not federal--questions of law that have arisen since the Texas legislature's passing of art. 35.261 in its Code of Criminal Procedure. Significantly, the State does not argue that this statute--or the decision of the Texas Court of Criminal Appeals--is unconstitutional; with what, then, is the State left as a basis for its arguments? It can raise only questions of application and procedure of such a sort that ruling upon them, if this Court deigns to do so, would place this Court in the undesired and unauthorized role of a "third" court of criminal appeals.

Prior decisions of this Court have made it clear that this Court does not sit as a mere "third" court of appeals. Rather, this Court's role in the judicial system is unique: to grant certiorari

at its own discretion and to review cases in which, according to the mandate of 28 U.S.C. § 1257, issues of Constitutionality or federal supremacy are at stake. In Burgett v. Texas, 389 U.S. 109 (1968), this Court noted that "we do not sit as a court of criminal appeals to review state cases. The States are free to provide such procedures as they choose...provided that none of them infringes a guarantee in the Federal Constitution." Burgett, 389 U.S. 109, 113-114 (1968). If this Court were to grant certiorari on the Questions Presented and the Reasons for Review proffered by the State in this case, this Court would be casting itself in the very role its jurisprudence has always sought to avoid.

Yet the State's representative, quite understandably, dares not make any attempt to suggest that the Texas statute is unconstitutional, and consequently has been forced to confine the scope of his Reasons for Review to non-constitutional, ordinary state appellate issues of the type inappropriate for adjudication by this Court. For any suggestion or hint that the Texas Court's ruling and art. 35.261 are actually unconstitutional would force the State's representative, a Dallas Assistant District Attorney, into an inextricable corner since a) his own office lobbied the Texas Legislature to enact art. 35.261 in its current form, and b) the Texas legislature enacted that statute in the wake of this Court's ruling in Batson--and Batson itself cannot be unconstitutional! The Texas legislature's goal in so doing was to ensure compliance with, and conformity to, this Court's sound interpretation of the U.S. Constitution in Batson, in a manner consistent with both the letter and spirit of that case. Unable--and unwilling--to challenge the validity of the statute and the

Texas court's ruling, the State has resorted to makeweight arguments that utterly lack merit on their own (see, infra) and, in any event, do not belong in this Court.

ADDITIONAL CONSTITUTIONAL PROVISIONS

TEX. CONST. art. 1, § 3 states in relevant part:

> Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

TEX. CONST. art. 1, § 3a states in relevant part:

> Sec. 3a. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

It should be noted that Texas has a free and independent State Constitution and it has been interpreted independently of the U.S. Constitution. See, Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991).

STATEMENT OF THE CASE

On the first day of Respondent Hill's aggravated robbery trial, the trial court granted Hill's Motion in Limine No. 1, which is attached as an appendix, and instructed the State not to strike anyone on the basis of race. Significantly, this was prior to voir dire examination of the jury panel. The State has reproduced the "35.261/ Batson" hearing at pp. 49-51 of its Appendix to it's Petition for Writ of Certiorari. However, the State did not reproduce any of the questioning of prospective Juror Lastun by either the State's representative at trial or by defense counsel. By this omission, the State would seek to have this Court operate in a vacuum, leaving it up to the Court's imagination to speculate

as to what Juror Lastun might have said. Respondent has reproduced the entire questioning of the stricken venireman in his Appendix.

The State would have this Court believe that no defense was offered by Respondent at trial and that the jury was able to convict Respondent with little, or no, need for deliberation. Nothing could be further from the truth. The entire second volume of the trial record is devoted to Respondent's motion to suppress the identification of the Respondent in a photo lineup procedure. The officer who conducted the lineup, as well as all three witnesses, testified.

Complaining witness, Billie Dickey, established that the photo lineup, out of which she picked Respondent's picture, was suggestive in that only Respondent's photo was taken with the jail's height markers in the background, indicating that only Respondent's photograph was a "mug shot".

Witness, Violet Bell, had been unable to pick out any picture from the police-conducted photo lineup. At the pretrial hearing, however, Witness Bell picked out photograph "No. 6", a completely different person from Michael Hill. The trial court made a specific finding that witness Bell had failed to identify Hill. This is hardly the "corroboration" the State would urge this Court to have occurred.

Witness, Sharon Thompson, admitted in the pretrial hearing that Hill's photograph was distinctive, in that it contained "lines and numbers" whereas the other photographs contained no such markings.

The trial court ruled that the photo lineup was inadmissible. Defense counsel stated his intention of offer the lineup against

witness Bell and the State offered no objection.

The trial before the jury commenced on the morning of October 5, 1988. Witness, Billie Dickey, admitted that she had been totally unfamiliar with guns prior to the alleged robbery but had been able to describe the gun with sufficient particularity to the police on the date of the offense to enable them to determine the type of weapon it was - an automatic. However, after having Respondent approach the witness stand, witness Dickey admitted that she had not noticed the vivid tattoo on Respondent's right forearm, on the hand of the person who robbed her, although this was admittedly the same hand that held the gun.

In the presence of the jury, Witness Violet Bell admitted that she had picked out a different person from Respondent in the photo lineup.

Witness, Sharon Thompson, admitted that much of her attention had been focused on hiding her own jewelry during the course of the robbery. This witness also failed to see the tattoo that was on Respondent's hand on the hand of the robber. It was stipulated by the parties that Respondent had the tattoo on his arm prior to the date of the robbery.

The case was argued to the jury at 1:38 p.m. on October 5, 1988. Defense counsel argued that the obvious shock on the faces of the witnesses upon being confronted with the tattoo, that they had never seen before, spoke more clearly than words. Counsel argued that the true robber was the person selected out of the photo lineup by Violet Bell.

The jury was retired to deliberate on guilt or innocence at 2:08 p.m. on October 5, 1988. At 5:48 p.m., the jury foreman came

out and announced that the jury was deadlocked. The trial court allowed the jury to separate and ordered them to return at 8:30 a.m. on October 6, 1988 to continue deliberations.

The jury continued deliberations at 9:00 a.m. on October 6, 1988. At 10:38 a.m., the foreman announced that they were "hopelessly deadlocked". Deliberations had now gone on almost twice as long as the presentation of evidence before the jury. The trial court submitted an Allen-type charge. The jury returned to the jury room at 10:40 a.m. on October 6, 1988. They were excused from the jury room for luncheon recess at 12:00 noon, returned to continue deliberations at 1:00 p.m. and reached a verdict of guilty at 1:34 p.m. This was hardly the quick, easy jury verdict portrayed by the State. If this Court were to accept the State's version of the trial, it would doubtlessly conclude that the jury reached a "3-minute guilty" verdict. The State's statements to this Court pertaining both to this Court's "Jurisdiction" and to the synopsis of the trial have been far less than accurate. The State's legal analysis is even more troublesome.

This is not a close case. This is a case in which the prosecutor's momentary lapse of reasoning caused him to admit that he struck a juror explicitly because the juror was black and because of his assumption that the shared race of the juror and the defendant would cause the juror to favor the defendant over the State. A reason for a peremptory challenge cannot be racially-neutral when it is racially-specific, particularly where the hastily-contrived "add-on" reasons are clearly pretextual. When asked why he struck Lastun, the prosecutor said: "Your honor, I struck Mr. Lastun because I feel that he would identify with the

defendant. He's black, he's male, and I didn't like the way he responded to my questions." When pressed to identify the questions that he did not like the answers to, the prosecutor faltered and said: "I'll have to have them read back to me. I can't remember what they were [emph.] but I just didn't like the way he responded to my questions, his attitude, his demeanor."

Defense counsel pressed on, knowing full well that the prosecutor had only asked Juror Lastun about his occupation and whether he felt that he could think of any reason why he could not be fair and impartial in this particular case. Lastun, of course, had been a data technician with AT&T for twenty years, demonstrating his stability and ties to the community. But significantly, when cross-examined about Juror Lastun's one case-specific answer to the prosecutor's question about impartiality, the prosecutor admitted that Lastun answered the question, "as did everybody that qualified on the jury". Prosecutor Pickett admitted to a race-specific reason for striking Lastun and could not remember anything that Lastun had said. "Attitude" and "demeanor" are merely words that a prosecutor can be trained to regurgitate without much thought in a vain attempt to escape the consequences of prejudice, if the appellate courts will only allow them to do so. If this Court grants certiorari in this case and allows two such throw-away words as "attitude" and "demeanor" to extricate this prosecutor from his obvious faux pas, then the court might as well overrule Batson and abandon its noble efforts to enforce the equal protection clause in jury selection.

Quite simply, no case could provide a worse factual scenario for this Court on which to grant the writ of certiorari. All of

the main issues in this case have already been disposed of, as Respondent shall elaborate further, infra. See, e.g., Hernandez v. New York, 500 U.S. ____ , 111 S.Ct. 1364, 114 L.Ed.2d 411 (1991). The vigilance of the Texas appellate courts in their enforcement of Batson and art. 35.261 is to be applauded, not criticized, particularly when the Dallas District Attorney's office is concerned. It is common knowledge throughout Texas that this office within recent memory maintained a written policy directing its trial deputies to strike blacks and other minorities from juries. Ingrained habits die hard, a fact that is painfully obvious in this case. Nowhere is the Dallas office's mala fides more in evidence than in its repeated attempts to cloud the issues in this case by insisting below that Juror Lastun and Respondent were both young and black. The State has consistently distorted the facts of this case to attempt to render them analogous to the facts of a different case. Lee v. State, 747 S.W.2d 57, 59 (Tex. App. -- Houston [1st Dist.] 1988, pet ref'd.). The State's attempt to distort the facts of this case continued through oral argument to the Court of Criminal Appeals, to no avail.

This case concerns a "facially-discriminatory strike". In Batson, this Court specifically held that, as a matter of law, a "neutral" explanation cannot be that the shared race of the defendant and the veniremen would result in partiality to the defendant. Batson v. Kentucky, 476 U.S. 79, 97 (1986). Other facially invalid explanations are variations on this theme. Commentators have criticized the Batson opinion for side-stepping the issue of the extent to which race may be a factor in the decision to strike a juror, in that Batson defined the prohibited

act as striking veniremen "on account of their race". This Court then "clarified" the issue by requiring the strike to be "solely" by reason of the juror's race. Powers v. Ohio, 500 U.S. ____ , 11 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Texas courts have been very aggressive in attempting to define what would constitute a "facially-invalid" strike. A strike based on membership in a minority club was held to be facially-invalid. Moore v. State, 811 S.W.2d 197, 200 (Tex. App. -- Houston [1st Dist.] 1991, no pet.). Similarly, a peremptory challenge based upon NAACP membership was held to be facially discriminatory. Somerville v. State, 792 S.W.2d 265, 267-68 (Tex. App. -- Dallas 1990, pet. ref'd.). Texas has consistently rejected "sight strikes", i.e., strikes based only upon disliking the "looks" of a prospective minority juror. Davis v. State, 796 S.W.2d 813, 819 (Tex. App. -- Dallas 1990, pet ref'd.). Indeed, in the Court of Criminal Appeals opinion in this case, a four-man concurring minority argued for the creation of a "bright-line" rule: that equal protection is denied whenever race is a factor in the exercise of a peremptory challenge. Hill v. State, 827 S.W.2d 860, 875 (Tex. Crim. App. 1992) (concurring opinion). Judge Baird wrote, convincingly, that "one simply cannot articulate a `race neutral' explanation for exercising a peremptory strike when race is a part of that explanation." Id. The prosecutor's explanation in this case has received universal condemnation at seminars and in law review articles, see infra, because of its facial invalidity and further because the prosecutor could not remember anything specific that occurred during voir dire that would justify the race-specific strike. Pickett could not articulate any responses

where, during voir dire, the venireman indicated in some demonstrable manner that he really might have a racially-motivated or related reason to favor the Respondent.

One commentator, who happens to be a member of the Dallas County District Attorney's Office, contrasted "unacceptable Batson explanations" with "questionable Batson explanations", and found his colleague Pickett's explanation in this case to fall into the "unacceptable" column. G. West, Batson v. Kentucky and Article 35.261 - Part 3, 20 Voice for the Defense 21, No.2 (March 1991). The Dallas District Attorney's Office is truly divided against itself as to the validity of this explanation. As Respondent will later point out, the schizophrenia of this office is nowhere more evident than in its legislative posture with regard to Art. 35.261. TEX. CODE CRIM. PROC. art. 35.261 (Vernon 1989). It is chiefly due to the efforts of a member of this same Dallas office that the "replacement" remedy and the "before discharge" temporal requirement were not included in the statute. Did the Dallas D.A.'s trial section deliberately sabotage 35.261 in order to have defendants follow it, so that the appellate section could then argue that 35.261 was unconstitutional? Such Byzantine motivations surely escaped them. In reality, the reputation of this office for always seeking to win at any cost, regardless of the consequences to intellectual honesty, legal ethics, and its own credibility, is legion. Fricker, Win at Any Cost? Dallas DA Under Siege, 75 A.B.A.J. 52 (July, 1989).

The State devotes a great deal of verbiage to the prima facie case issue. As Respondent will develop further, this Court has thoroughly dealt with this issue in a recent opinion. Hernandez v.

New York, supra. No further elucidation of this issue by this Court would seem necessary at this time. The trial court obviously presupposed the existence of a prima facie case, possibly due to the common knowledge that racial discrimination in jury selection historically has always been at least an unofficial policy of the Dallas D.A.'s office, or else he would not have directed the prosecutor to offer a race-neutral explanation for his challenge.

In a recent case, this Court seemed to go to considerable lengths to avoid saying that "shared race" and "shared language" would constitute a "race-neutral" explanation. In the context of that trial, this Court held that "the prosecutor's frank admission that his ground for excusing these jurors related to their ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact were race-based peremptory challenges." Hernandez v. New York, 500 U.S. ____, 111 S.Ct. 1859, 1868, 114 L.Ed.2d 395 (1991).

In this case, prosecutor Pickett's explanation, which was admittedly based on race, raised an inference [emph.] that the other factors were a pretext. Since he could not remember his questions or Lastun's answers, it was obvious that the "attitude" and "demeanor" reasons were entirely pretextual.

Unlike this case, the prosecutor in Hernandez avoided the inference by showing that "specific [emph.] responses and the demeanor of the two individuals during voir dire [emph.] caused him to doubt their ability to defer to the official translation of Spanish-language testimony." Id, 111 S.Ct. at 1867. The New York prosecutor pointed to specific, case-related, voir dire-illuminated conduct--statements and actions on the part of the stricken jurors-

-that left no doubt in the mind of this Court that the New York prosecutor had based his challenges on conduct of those jurors that actually occurred during voir dire. The conduct of the jurors had legitimately persuaded him that they might have difficulty in accepting the translator's rendition of Spanish-language testimony. This Court took great pains to distinguish between arguably race-based reasons, which are clearly based on conduct that definitely occurred during voir dire, and arguably race-based reasons, which could not possibly be based on anything that occurred during voir dire, as here.

Compared with Hernandez, the contrast between the New York prosecutor's explanation, which did not give rise to the inference, and Pickett's explanation, which clearly did give rise to the inference, could not be more obvious. Hernandez should be dispositive in this case because it illustrates that a prosecutor's race-specific explanation may yet pass muster in an appropriate case in which voir dire has revealed that the potential juror may have a problem sitting on a particular jury because of factors that are, arguably, connected with that juror's shared racial characteristics with one of the parties. Pickett's race-specific explanation combined with his obviously - pretextual "add-on" reasons are simply too incredible to be accepted by this Court. It wasn't even close, as in Hernandez.

The prosecutor must articulate a "clear and reasonably specific explanation" related to the particular case to be tried. Batson v. Kentucky, 476 U.S. at 98. If Pickett had conducted a voir dire of Lastun that had revealed some support for his, Pickett's, conclusion that Lastun would identify with Appellant,

then we might have a different case, but Pickett's voir dire was perfunctory in that in no way did it seek to explore Lastun's racial attitudes. Thus, Pickett's explanation was not based on anything that he had learned during voir dire but on mere assumptions, which Batson prohibits. Art. 35.261 requires a defendant to show only that "the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the State were made for reasons based on race." [emph.]. Here, the combination of a facially race-based [emph.] reason and the pretextual nature of the other factors cited by the prosecutor, as revealed by cross-examination, truly revealed that race was the sole reason for the strike in this case.

Since the State has never even attempted to show that Pickett struck all, or mostly all, the males from the jury, then "black and male" really serves as a pretext for striking only "black males". Pickett's assumption that Lastun would identify with Appellant only based on shared sex and shared race between Lastun and Appellant cannot escape the prohibition of art. 35.261 or Batson. Batson v. Kentucky, 476 U.S. at 97.

REASONS FOR DENYING REVIEW

I.

THE HOLDING OF THE COURT OF CRIMINAL APPEALS IN THIS CASE HAS MET WITH UNIVERSAL ACCEPTANCE AND, IF DISTURBED, WOULD SEND THE WRONG MESSAGE TO PROSECUTORS THAT THEY MAY ADMIT TO STRIKING JURORS ON THE BASIS OF RACE BUT THEN ESCAPE THE CONSEQUENCES OF THEIR ADMITTED RACIAL ANIMUS BY MERELY UTTERING THE WORDS "ATTITUDE" AND "DEMEANOR".

If the Dallas District Attorney is concerned about the public's perceptions about this case, then he should absolutely

prohibit his other associates from lecturing at statewide seminars. One of his representatives has characterized prosecutor Pickett's explanation in this very case as an "unacceptable explanation". See, Address by George West, Chief Felony Prosecutor, Dallas County District Attorney's Office, Batson Issues, Prepared for Texas Criminal Defense Lawyers Association Advanced Criminal Law Short Course (June 11-13, 1992). The same office that stands before this Court lamenting the "severe undermining" that will supposedly befall the public's confidence in the criminal justice system is simultaneously sending an emissary out on the lecture circuit to decry this case as an example to other attorneys of what not to say when called for a racially-neutral explanation for a peremptory challenge. This representative, while claiming to stand for the entire Dallas D.A.'s office, is teaching lawyers throughout the State of Texas that his colleague's explanation was "unacceptable", rather than merely "questionable". Address by George West, supra, at pp. 18-22. The fact that this office presents one point of view to the bar and a diametrically opposite point of view to this Court has not been lost on Respondent. Thus, Respondent has included the cover sheet and the relevant pages of the article in his Appendix, since this significant article appears to represent the more intellectually honest position of the Dallas D.A.'s office. This Court should consider the deleterious effects on public confidence in the criminal justice system that it would inflict by granting certiorari to review an explanation that the Dallas D.A.'s office has publicly disavowed.

Even more troublesome in its potential adverse impact on "public confidence" would be the schizophrenic posture taken by

this same Dallas D.A.'s office in the Texas Legislature. It is well established in the voluminous briefs in the lower courts that on February 21, 1989, a bill that was drafted by Jeffrey Brian Keck - the State's representative - was introduced before the Texas Senate for the primary purpose of restoring into art. 35.261 the "reconstituted jury" remedy and the "before discharge" temporal requirement. Those procedures were eliminated partly due to the efforts of Kevin Chapman, another Dallas County Assistant D.A., who testified before the legislature that the "replacement" remedy was potentially problematic because the stricken venireman might feel alienated at having been removed and might possibly hold a grudge against the State. Would public confidence in the criminal justice system be enhanced if the public perceived that the Dallas D.A.'s office had helped to establish a "straw-man" statute, art. 35.261; encouraged defense attorneys to rely on it on the lecture circuit; then asked that it be declared unconstitutional for the sole purpose of penalizing a defendant who invoked it? The public perception of such a Machiavellian and Byzantine plot, whether true or untrue, concocted apparently to enable the D.A.'s office to continue its policy of racial discrimination, could only further alienate the minority population of Dallas. Since the public might then perceive this office as a "house divided against itself", this Court should refuse to grant the writ, thereby compelling this Dallas D.A.'s office to finally develop a consensus as to its posture concerning what certainly was a "facially-discriminatory/unacceptable" strike. Further, if the "replacement" remedy must forever remain inviolate because of the permissive footnote at the end of the Batson opinion, then the Dallas D.A.'s

office should not be allowed to lobby to exclude the remedy from the statute and then stymie its application for that very reason. Batson v. Kentucky, 476 U.S. at 99 fn. 24. This is the most universally ridiculed explanation ever offered by a prosecutor in a Batson hearing. The public has had no problem understanding that this case was reversed because of a noble purpose - to eliminate racial discrimination in jury selection.

II.

THIS COURT SHOULD DENY REVIEW BECAUSE THE TEXAS LEGISLATURE MERELY EXERCISED ITS CONSTITUTIONAL POWER TO REGULATE VOIR DIRE WHEN IT ENACTED TEX. CODE CRIM. PROC. ART. 35.261.

In Batson, the defense attorney moved to discharge the jury before it was sworn. Batson v. Kentucky, 476 U.S. at 83. It is unlikely that this Court would declare unconstitutional a statute that establishes a procedure which is exactly the same as the one that provided the basis for the Batson opinion. The possibility of an additional "replacement/ reconstituted jury" remedy was added, almost as an afterthought, by way of a footnote to the Batson opinion. Id, 476 U.S. at 99 fn. 24. The "before discharge" temporal requirement was derived from the "reconstituted jury" remedy. The Texas legislature adopted art. 35.261 to eliminate a perceived "hodgepodge of remedies" and confusion on the part of attorneys as to when to raise the objection. The legislative history was clear that the legislature wanted to end the problem of trial courts' failure to address Batson issues because a defense attorney failed to raise the objection prior to discharge. The Texas legislature approves of Batson. They correctly perceive it

as an opportunity to instill confidence in the criminal justice system by minorities who come into contact with that system. The appellate courts are eager to enforce Batson because of the perceived need to eradicate the stain of official policies of purposeful discrimination, particularly in Dallas, where the policy was in written form and also received widespread negative publicity. In the election that first seated the incumbent District Attorney, John Vance, it was revealed that his opponent John Sparling, had authored the Dallas office's now-infamous written policies compelling its assistants to discriminate against minority veniremen. Given that this revelation sounded the death-knell for Mr. Sparling's political aspirations, it would seem that Mr. Vance's office ought to assiduously avoid even the appearance of condoning a facially-discriminatory peremptory challenge.

The legislature removed the "replacement" remedy from consideration by trial courts, after much debate and soul-searching, chiefly due to the efforts of Dallas Assistant D.A. Kevin Chapman, who apparently convinced the legislature that the reinstated veniremen might somehow figure out what happened and hold a grudge against the State.

The State has argued that the "before discharge" temporal requirement could serve a further useful purpose in providing "further information" during the Batson hearing, but the State has ignored the fact that, in Texas, prosecutors and defense attorneys exercise their strikes without having the jurors in their presence to associate names and faces so they should not need them present to explain those same strikes. The "stricken juror showup procedure" contemplated by the State would be a bad public policy

because it would only tend to "red-flag" to that juror that his racial or other irrelevant characteristics had been made into an issue at the trial, the very evil sought to be eliminated by art. 35.261. Such an individualized "juror lineup" procedure, accompanied by questioning about the juror's racial background, could only lead to embarrassment for all concerned.

The State's argument that defense attorneys might now admit to being racists to endlessly prolong trials and that trial judges will resist finding prima facie cases in order to avoid the whole Batson problem in the first place presupposes that neither defense attorneys or trial judges will ever fulfill their ethical duty and that no potential sanction other than the "reconstituted jury" procedure will force either one to follow the dictates of Batson. This ignores the fact that the original Batson opinion was handed down to keep prosecutors [emph.] from wrongfully striking jurors, since it was the prosecutorial element of all the potential trial participants that originally seemed to this Court to be most suspect of having ill-will or an evil motive, rather than defense attorneys or judges.

The notion that art. 35.261 is somehow invalid seems particularly meritless since one could presume that the procedure "suggested" by this Court for implementation of its rule in Batson would be constitutionally permissible. The argument also appears to ignore the fact that, in Texas at least, it is the legislature - not the trial courts - that bears the constitutional obligation to establish procedures for voir dir. TEX. CONST. ART. 1, § 15. If the legislature moved to abolish peremptory challenges altogether, would the State argue that the "replacement" remedy remained due to

the purportedly immutable procedure contained in Batson's footnote 24? As Judge Clinton of the Texas Court of Criminal Appeals remarked at oral argument in this case, a footnote seems like a strange place for this Court to announce such an inflexible and immutable principle. It would also seem unlikely that art. 35.261 could be unconstitutional since it is virtually identical to the procedure set forth in the case cited at footnote 24 in Batson. Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985).

III.

THIS COURT HAS ALREADY ANSWERED ALL OF THE STATE'S QUESTIONS ABOUT WHETHER AN APPELLATE COURT SHOULD REVIEW THE EXISTENCE OF A PRIMA FACIE CASE.

The State has argued that the appellate courts should rule on the merits and absolve the State of racism in its peremptory challenges, regardless of the lack of a prima facie case, if the State's reasons are actually found by the appellate court to be racially-neutral or if the appellate court rules that the defendant has failed to carry his ultimate burden. As to the defense, on the other hand, the State has argued that a defendant should be cut off procedurally by the "prima facie case dodge" if the State has failed to articulate a racially neutral reason or if the defendant carries his ultimate burden. Thus, the State argues that the appellate court should always evade the issue of racial discrimination by using the "dodge" where the State would lose, but conversely, should always address the issue on the merits where the State would win. The State cannot have it both ways. A racist district attorney would certainly be willing to volunteer his "race-neutral" explanations at a very early stage if he knew that

he could discriminate, and get away with it, by resorting to such a subterfuge.

The case law underpinnings for this Court's "mootness" doctrine do not limit themselves solely to situations which work only to the State's advantage. The beginning of the "mootness" analysis is at United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 1481-82, 75 L.Ed.2d 403 (1983) [hereinafter "Aikens"]. Aikens was a civil rights case that has been repeatedly found to contain an appropriate analogy for Batson cases. This Court in Aikens noted that:

> Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in those terms, they have unnecessarily evaded the ultimate question of discrimination vel non.

Aikens, 103 S.Ct at 1481.

Where the government offers proof of the reasons for its challenge, the Batson presumption that peremptories allow a prosecutor to discriminate where he is of a mind to discriminate drops from the case. The factfinder must then determine whether the defendant carried his ultimate burden of proving that the prosecutor's peremptories were exercised for a racially discriminatory purpose. The prima facie case method was never intended to be rigid, mechanized or ritualistic. Aikens, supra, 103 S.Ct. at 1482. This Court did not rule that the plaintiff, Aikens, should lose for failure to make a prima facie case if the District Court found on remand that he had carried his burden, as the State would have this Court believe. This Court did not remand

the case to the District Court to find the prima facie issue to be "moot" only if the Postal Service would win on the merits, as the State would suggest. On the contrary, the Court remanded the case to the District Court to consider Aikens' case on the merits.

The Supreme Court in Aikens instructed the District Court to consider Aikens' claim on the merits without evading the issue on the "prima facie case dodge" and indeed pointed out that it would not be reversible error for the District Court to conclude that the Postal Service had discriminated against Aikens. Id, 103 S.Ct. at 1481 fn.2. Indeed, why would this Court take such pains to point out to the District Court that it would not be reversible error for the District Court to rule for Aikens if it was actually only directing the District Court to overrule his claim on the "prima facie case dodge"? This Court ordered the District Court to decide which party's explanation it believed on the merits because the District Court had before it all the evidence it needed to decide the ultimate fact question of discrimination. The State's attempt to turn the "prima facie case dodge" issue into a shield only where it would otherwise lose finds no support in Aikens, which is the genesis of this issue.

If the State has misconstrued Aikens, then it has totally missed the point of United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987). The holding of that case is quite clear. When the prosecutor's explanation is of record, the reviewing court will review only the trial court's finding of discrimination vel non without becoming bogged down on the question of whether the defendant had made a prima facie case. By the time a fully-tried case reaches the reviewing court on appeal, the parties' showing at

the preliminary levels of the trial is irrelevant. Id, 816 F.2d at 1010.

The Fifth Circuit went on to give a complete analysis of when the establishment of a prima facie case will be the proper subject of the appellate court's review: when the prosecutor fails to give any explanation at all. Id, 816 F.2d at p. 1011. If the trial court fails to find that a prima facie case has been made and therefore does not require the prosecutor to respond, the appellate court will focus on the existence or non-existence of a prima facie case. In Forbes, the Assistant U.S. Attorney incorrectly believed that he only had to explain the majority of his challenges but the defense attorney waived an explanation for the third challenged black venireperson. The 5th Circuit Court pointed out that, "if defendants had raised below any question respecting this particular strike, or the prosecutor's continued silence, we would have to decide whether defendants had established a prima facie case." Id. It is difficult to understand how the State failed to grasp the significance of this language.

The State has argued that in the future its representatives will be reluctant to "volunteer" reasons for their strikes where the court has not specifically (correctly, in their sole estimation?) ruled that a defendant has properly made out a prima facie case. The State's attorney has once again ignored or missed the language of an opinion cited in its Petition for Writ of Certiorari that would actually work to the State's benefit in future cases. Hernandez v. New York, 500 U.S _____, 111 S.Ct. 1859, 1872, 114 L.Ed.2d 395 (1991). In that opinion, Justice Kennedy gave the prosecutor credit for volunteering his defense of his

peremptory challenges "without being asked to do so by the judge." Id, 111 S.Ct. at p. 1872.

Although the Supreme Court was willing to give the state in Hernandez some "credit" for its initiative, it was not willing to rule for the State on the "prima facie case dodge" urged by the New York prosecutor, as it is urged by the Dallas D.A.'s office in this case. Citing Aikens, supra, the Supreme Court noted that the prosecutor had defended his peremptories without any prompting or inquiry from the trial court. Thus, the trial court in Hernandez had no occasion to rule that the defendant had or had not made a prima facie showing of intentional discrimination. Id, 111 S.Ct. at p. 1866. It is true that Justice Kennedy went on to cite the language from Aikens about the defendant [emph.] "having done everything required of him," but the Aikens rule of "mootness" was not enunciated only for the benefit of the Postal Service, as the State would have this Court believe, and the Hernandez "mootness" rule should not be read in such a lopsided manner either. Aikens, supra, 103 S.Ct. at p. 1481 fn.2. The existence or non-existence of a prima facie case would not have prevented plaintiff Aikens from winning his case; likewise, nor would it prevent defendant Hernandez (or Michael Lee Hill), from arguing successfully that he carried his ultimate burden of showing intentional discrimination. As the Supreme Court stated without limitation:

> Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether defendant had made a prima facie showing becomes moot.

Hernandez v. New York, 111 S.Ct. at p. 1866.

"Mootness" does not apply only when the State should win on the merits. That argument is utterly without merit. "Mootness" applies where the State has advanced its "race-neutral" reasons for its challenge. At this point, the reviewing Court has everything it needs to make a ruling on the merits. Art. 35.261 was drafted for the purpose of eliminating such procedural dodges.

IV.

SINCE THE BATSON HEARING WAS HELD ON THE MERITS, THE EXISTENCE OF A PRIMA FACIE CASE IS NO LONGER RELEVANT BUT BATSON CLEARLY PROHIBITS EVEN ONE SINGLE CLEARLY RACIALLY-MOTIVATED STRIKE.

As Respondent has fully explained, the existence of a prima facie case is no longer reviewable. However, it seems elementary that a case could arise where it would become perfectly obvious that a prosecutor had intentionally discriminated against one, but not all, minority jurors, which is exactly what happened here. For instance, the obvious example would be where a prosecutor actually admits that he struck a particular juror solely on account of his race, as in this case. It will probably be such a rare occurrence that this Court need not worry that it is opening "Pandora's Box", as the State would suggest, because such an admission could only be the result of a momentary lapse of reasoning by a prosecutor.

It is quite obvious that Batson explicitly applies to the racially-motivated peremptory challenge of a single black juror. Batson v. Kentucky, 476 U.S. 99, fn.22. It has been recognized that it would certainly be easier to find the presence of a prima facie case where all blacks are excluded; however, it cannot be said that the inclusion of blacks on a jury bars a prima facie

case, "especially where other facts and circumstances may constitute an inference of prosecutorial discrimination in the selection process." United States v. Clemons, 843 F.2d 741, 747 (3rd Cir. 1988).

The State's erroneous citation of Unites States v. Clemons is another example of the total lack of credibility to which this State's effort is entitled. In its Petition, the State cites Clemons for the proposition that "every federal court...has held that the strike of a single black venireman cannot standing alone constitute a prima facie case." (State's Pet. p. 23). Of course, if one overemphasizes the phrase "standing alone", this statement may be literally true but totally beside the point. No one would argue that any one factor, other than an outright admission of a racial animus, such as in this case, would ordinarily constitute a prima facie case. However, the State's point is at the least highly misleading in that the principle enunciated by the State seems to be completely at odds with the opinion from which the State claims to draw its authority. In United States v. Clemons, the court held:

> Striking a single black juror could [emph.] constitute a prima facie case even when blacks ultimately sit on the panel and even when valid reasons exist for striking other blacks.

United States v. Clemons, 843 F.2d at 747. This is precisely the opposite proposition for which the State attempts to cite this case. Careful consideration should be given to granting review based on such suspect scholarship.

This Court has properly avoided, and should continue to avoid, creating any per se rule governing how many blacks or other

minorities must be struck to constitute a prima facie case under Batson. Batson requires trial courts to "consider all relevant circumstances", including, but not limited to, a consistent pattern of strikes against black jurors or "a prosecutor's statements during the voir dire process". Batson v. Kentucky, 476 U.S. at 96-97. Thus, Batson would seem to require that the trial court consider "disparate" or "perfunctory" questioning without any need for prompting by defense attorneys or use of "buzz words". The trial judge obviously considered the lack of any meaningful questioning directed to Juror Lastun, as well as his perfectly normal response, which was in no way dissimilar to the responses of the white male jurors who qualified on the jury.

Furthermore, the State's reliance on United States v. Chalan appears to be misplaced. In that case, three out of four Indian jurors were removable for cause and the government used a peremptory challenge to strike "the last remaining juror of defendant's race". This was held to be a prima facie case, even though the government used a peremptory only on one minority juror. It is difficult to discern any major distinction between a situation in which some minorities make it on the jury and a situation in which all but one admit to a bias and have to be stricken for cause. That court said only that the striking of a single juror may not always be sufficient to establish a prima facie case; it did not suggest that striking a single venireman would never be sufficient. This Court should refuse to adopt such a bright-line rule. United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987). This might appear to grant the State license to strike minorities from juries by resorting to the subterfuge of

leaving a single token on the jury.

V.

AN APPELLATE COURT, WHEN REVIEWING A FACIALLY-DISCRIMINATORY REASON FOR A PEREMPTORY CHALLENGE, SHOULD PROPERLY GIVE NO CONSIDERATION TO THE IRRELEVANT FACT THAT OTHER MINORITY JURORS MAY HAVE ACTUALLY SERVED ON THE JURY.

Pickett struck Lastun admittedly because Lastun was black and because he did not like Lastun's answers to his questions. When pressed, Pickett could not remember the questions or the answers, establishing an obvious pretext. The words "attitude" and "demeanor" are too non-specific to amount to anything but a plain pretext. The "perfunctory" nature of Pickett's questioning of Lastun was established during defense counsel's cross-examination of Pickett. Keeton v. State, 749 S.W.2d 861, 868 (Tex. Crim. App. 1988); Tompkins v. State, 774 S.W.2d 195, 202 fn. 6A (Tex. Crim. App. 1987), affd. 109 S.Ct. 2180 (1989). The "disparate impact" of Pickett's strike was pointed out during cross-examination by Pickett's assertion that Lastun had answered his questions exactly as did everyone who qualified on the jury. Under the circumstances, the Texas Court of Criminal Appeals was left with a definite and firm conviction that the trial court had made a mistake. The original Batson opinion recognized that a single discriminatory strike is not immunized by the absence of a discriminatory animus toward other jurors. Batson v. Kentucky, 476 U.S. at 95. Thus, the presence of the two black jurors was entitled to no consideration under the circumstances.

VI.

THERE ARE NO CIRCUMSTANCES UNDER WHICH A HARMLESS ERROR ANALYSIS MAY BE PROPERLY APPLIED TO BATSON ERROR.

The State's arguments on "harmless error" show a fundamental misunderstanding of the reasons underlying Batson. As noted in Batson:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. [citations omitted] Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others...[citations omitted].

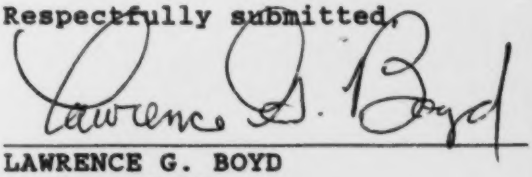
Batson v. Kentucky, 476 U.S. at 87-88. Batson is not really concerned solely with the protection of criminal defendants' rights. Considering the recent extension of Batson to prohibit racially-motivated strikes by all criminal defendants, this should be abundantly clear. Georgia v. McCollum, ____ U.S.____, 60 L.W. 4574 (1992). In all likelihood, under certain circumstances, a criminal defendant might well obtain a "fairer" trial (at least from his perspective) if he were free to discriminate at will. The criminal defendant, Respondent herein, in a sense, also stands in the shoes of the improperly-stricken Juror Lastun, who had a right cognizable under the U.S. and Texas Constitutions, as well as art. 35.261 to serve on this jury, duly hear the evidence and find Respondent either guilty or not guilty. Accordingly, whether or not a different outcome might have accrued is never the point in a case where a peremptory challenge is used to strike a venireman on

the basis of race.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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Counsel of Record
For Respondent

APPENDIX

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No. 0347-90

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

MICHAEL LEE HILL,
APPELLANT

VS.

STATE OF TEXAS,
APPELLEE

STATE'S MOTION TO RECALL MANDATE AND TO STAY REISSUANCE OF MANDATE FOR NINETY DAYS

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW the State of Texas, by and through her Criminal District Attorney and files this motion to withdraw the mandate of this Court in the instant case, and pursuant to T.R.A.P., Rule 232, to order that the re-issuance of the mandate in this cause be stayed for 90 days so that the State may timely file a petition for a writ of certiorari in the instant case. In support of this motion the State would show the Court the following:

I.

A. Proceedings in the Court of Appeals

The instant conviction was ordered reversed by the Court of Appeals in an opinion issued July 31, 1989. (Cause No. 05-88-01234-CR; in the trial court, the 283rd Judicial District Court of Dallas County Texas, Cause No. F88-72876). The basis for the order of reversal was that the trial court had erred in denying the Appellant's motion for dismissal of the jury panel based on the Appellant's federal constitutional equal protection rights as enunciated in Batson v. Kentucky, 476 U.S. 79 (1986).

The State's motion for rehearing of August 15, 1989 was overruled by the Court of Appeals on January 18, 1990, although a new opinion was issued by the Court of Appeals at that time. This second opinion also reversed the conviction, again on Batson grounds. See opinion at 787 S.W.2d 74,77-79.

Thereafter, the State filed a second motion for rehearing in the Court of Appeals pursuant to T.R.A.P., Rule 100(d)(West 1989). This motion was overruled on February 21, 1990.

B. Proceedings in the Court of Criminal Appeals

1. petition for discretionary review

The State's timely filed petition for discretionary review was filed on March 23, 1990. This petition was granted by this Court and the case was submitted on oral arguments on January 31, 1991.

This Court then affirmed the holding of the Court of Appeals, although on slightly different reasoning, in an opinion issued January 8, 1992.

2. State's motion for rehearing

The State's first motion for rehearing was filed January 29, 1992, following a grant of an extension to file the same. The State's first motion for rehearing was overruled on April 15, 1992.

3. State's second motion for rehearing and issuance of mandate

The State's second motion for rehearing[1] was mailed on April 28, 1992. The clerk of this Court (or his deputy) has orally advised the undersigned that the second motion for rehearing was not received by the clerk of this Court until May 4, 1992.

In the meantime, on May 1, 1992 this court had issued its mandate (May 1 being 15 days after the denial of the State's first motion for rehearing).

Accordingly when the State's second motion for rehearing arrived at the Court, the mandate had already issued. Upon receipt of the second motion for rehearing, this motion was ordered dismissed, since the mandate had already been issued.

---

[1] This motion urged the court to reconsider its previous rulings in light of the Court's recent opinion in Linscomb v. State, ____ S.W.2d ____, No. 203-91.

II.

Reasons supporting withdrawal of mandate

On May 7, 1992, the undersigned's office received the postal card (copy attached) advising the undersigned that the State's second motion for rehearing had been dismissed.

Due to the fact that the undersigned saw only a photocopy of this card, and due to the fact that the message was obscured by virtue of the fact that it had been typed on over the return address and the postmark, the undersigned believed that this card was only notice that the State's second motion for rehearing had been received by the Court, rather than acted upon. (It must be pointed out that the word "dismissed" is at least legible, even if none of the other information is clearly printed).

However, by May 26, 1992, the undersigned had become concerned that the Court had still not acted on the State's second motion for rehearing[2] and called the clerk's office. At this time the undersigned learned that the State's second motion for rehearing had been dismissed on May 4 and that the mandate had previously issued on May 1, 1992.

In the interim the undersigned had sought and obtained permission from the Attorney General of the State of Texas to file a petition for certiorari on behalf of the State of Texas in the Supreme Court of the United States. (Obtaining such permission is a rather

---

[2] Although the undersigned had filed the second motion for rehearing in good faith and not to simply delay the ultimate ruling on the case, given the fact that all nine judges of this Court had voted against the State and the State's first motion for rehearing had been refused within three weeks, the undersigned believed that the second motion for rehearing would probably not result in a reversal of this court's position, despite the merits of the motion.

laborious task which the undersigned, as well as the Assistant Attorney General's involved, would not like to repeat in order to get these issues before the Supreme Court). Permission to file certiorari was received on May 4, 1992.

T.R.A.P., Rule 232, provides that the court may issue a stay of mandate to allow for a timely filing of petition for a writ of certiorari to the U.S. Supreme Court. The State is asking for a 90 day stay (as of May 1, 1992). to accommodate the 90 day time limit for such petitions now allowed by Rule 20.1 of the Supreme Court rules for petitions for writ of certiorari.

The undersigned believes that the instant case presents at least two issues that have not been, but ought to be decided by the U.S. Supreme Court. While these issues will be present in other cases, the undersigned believes that they will not be presented soon in any other case where the facts render the legal issues involved so remarkably clear and free of any troubling questions about the prosecutor's intent.

PRAYER

WHEREFORE PREMISES CONSIDERED the State respectfully prays that

1. This Court order its mandate in the instant case recalled and that the Clerk of the Court of Appeals of the Fifth District of Texas be advised of this decision.

2. That the issuance (or re-issuance) of the mandate be stayed for 90 days, (from May 1, 1992) that is until July 31, 1992 to allow the State to file a petition for a writ of certiorari in the Supreme Court of the United States.

Respectfully submitted,

JOHN VANCE
CRIMINAL DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

By: _____

JEFFREY B. KECK
ASSISTANT DISTRICT ATTORNEY
STATE BAR NO. 11144500
FRANK CROWLEY COURTS BLDG.
133 N. INDUSTRIAL BLVD., LB-19
DALLAS, TEXAS 75207-4399
(214) 653-3628

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been served on Larry Boyd, Attorney for Appellant, 5630 Yale Boulevard, Dallas, Texas, 75206, by depositing same in the United States Mail, Postage Prepaid, on this the 27th day of May, 1992.

_____
JEFFREY B. KECK

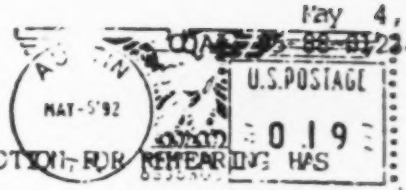
JBK/sn

APPENDIX A

Notice of dismissal of
State's Second Motion for Rehearing

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
OFFICIAL BUSINESS
STATE OF TEXAS
STATE PENALTY
FOR PRIVATE USE

May 4, 1992
88-01224-CR



Lee

S SECOND MOTION FOR REHEARING HAS

Tho. ... Law., Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: JOHN C VANCE
DISTRICT ATTORNEY
133 ... INDUSTRIAL BLVD LB-19
DALLAS TX 75207

05-07-92

BEST AVAILABLE COPY

NO. F-88-85869
F-88-72875
F-88-72876

STATE OF TEXAS	§	IN THE CRIMINAL
V.	§	283RD DISTRICT COURT
MICHAEL LEE HILL	§	DALLAS COUNTY, TEXAS

MOTION IN LIMINE NUMBER ONE

COMES NOW the Defendant, MICHAEL LEE HILL, prior to voir dire of the jury panel, who requests the Court to instruct the prosecution not to use racial discrimination in its exercise of peremptory challenges in jury selection. Batson v. Kentucky, ____ U.S. _____, 106 S.Ct. 1712 (1986). Tex. Code Crim. Proc. Ann. Art. 35.261.

WHEREFORE, premises considered, defendant prays the Court grant this motion and instruct the prosecution not to use racial discrimination in its exercise of peremptory challenges.

Respectfully submitted,

Lawrence G. Boyd

Lawrence G. Boyd
TBC #02775200
4627 N. Central Expressway
Dallas, Texas 75205-4094
(214) 528-2400

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion has been hand-delivered to the District Attorney's office this 14th day of Sept., 1988.

L. G. Boyd

Lawrence G. Boyd

BEST AVA

ORDER

On the _____ day of _____, 19___, came to be heard Defendant's Motion in Limine Number One and it appears that it should be granted.

The prosecution is ordered not to use racial discrimination in its exercise of peremptory challenges.

SIGNED this _____ day of _____, 19___.

_____
JUDGE PRESIDING

AILABLE COPY

October 1, 1986 - 1:10 p.m.

P R O C E E D I N G S

(Following proceedings had prior to voir dire examination of any jury panel.)

THE COURT: Is there anything that you can't agree on, first of all? These motions usually have about thirty paragraphs in them.

MR. BOYD: Which case are we going on today?

THE COURT: I'm looking at 72876.

You've got a ~~Batson~~ motion. I'll instruct the State not to strike anybody on the basis of race. I think that's what the motion is all about.

I see a motion to suppress in there. Are we going to have a hearing on that?

MR. BOYD: I think we better. I'm still trying to figure out how the State -- Did you have any physical evidence recovered from the truck that you intend to --

MR. PICKETT: In this case?

MR. BOYD: Uh-huh. I think you do.

MR. PICKETT: Just a credit card.

MR. BOYD: Okay. They have a credit card that they intend to offer that was seized as a result of that third case,

BEST AVAILABLE COPY

The following are all of the questions and answers for the State to Juror Lastun (R.- Vol. I, p. 23-24):

MR. PICKETT: Is that Lastun? Is that right, sir?

PROSPECTIVE JUROR: Uh-huh.

MR. PICKETT: What do you do for A T & T?

PROSPECTIVE JUROR: I'm a data tech--

MR. PICKETT: Pardon me?

PROSPECTIVE JUROR: A data technician.

MR. PICKETT: A data technician? How long -- I can barely read that. How long have you been with that company?

PROSPECTIVE JUROR: Twenty years.

MR. PICKETT: Can you think or any reason why you would not be fair and impartial in this particular case?

PROSPECTIVE JUROR: No.

MR. PICKETT: Okay.

For the purposes of including all comments by Juror Lastun, defense counsel asked the following question (R.-Vol. I, p. 52):

MR. BOYD: Mr. Lastun?

PROSPECTIVE JUROR: A friend of mine at work got robbed.

MR. BOYD: Okay. Did you discuss the facts of the case with him?

PROSPECTIVE JUROR: Well, yes, she told us what happened.

MR. BOYD: Okay. Do you feel that that would cause you any problem, like if you ever saw that friend again and you were -- had to defend yourself and say "Well, we acquitted someone who was accused of a crime like that"?

PROSPECTIVE JUROR: I don't think so.

Further, the following comments were made in response to questioning by defense counsel (R.- Vol. I, p. 59):

MR. BOYD: Ms. Ortosky, could you give the defendant the benefit of your individual judgment?

PROSPECTIVE JUROR: Yes.

MR. BOYD: Mr. Lastun, do you feel like you could?

PROSPECTIVE JUROR: Without a doubt.

BATSON ISSUES

Presented by

GEORGE E. WEST II

CHIEF FELONY PROSECUTOR
DALLAS COUNTY DISTRICT ATTORNEY'S OFFICE
DALLAS, TEXAS

Prepared for

The TCDLA/HONORABLE M. P. "RUSTY" DUNCAN, III

ADVANCED CRIMINAL LAW SHORT COURSE

June 11-13, 1992

SAN ANTONIO, TEXAS

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B.A. in Political Science with Distinction, Southern Methodist University
SMU Abroad: Paris, France, Joint Program

PROFESSIONAL ORGANIZATIONS

State Bar of Texas
Texas District and County Attorney's Association
National Bar Association (Former member)
J. L. Turner Legal Society (Former member)

LAW RELATED ACTIVITIES

Faculty Advisor, Criminal Trial Advocacy (CDLP), Sam Houston State University
Committee Member, Dallas Practical Skills Course, State Bar of Texas, Dallas, Texas
Chief Felony Prosecutor, Dallas County District Attorney's Office.
Advisor to the Governor on the Texas Punishment Standards Committee.
Member of the TDCAA Legislative Committee
Legislative Liaison for the Dallas County District Attorney's Office.
Former Chairperson of the Dallas Citizen/Police Review Board.

LAW RELATED LECTURES AND PUBLICATIONS

Speaker and Author, "Direct Examination," Prosecutor Trial Skills Course, TDCAA, Austin, Texas
Speaker and Author, "Voir Dire Problems," Prosecutor Trial Skills Course, TDCAA, Austin, Texas
Speaker and Author, "Grand Jury," Criminal Law Institute, South Texas College of Law
Author, "Effective Prosecution of Sex Offenses Against Children," Voice for Defense
Author, "Final Argument in Capital Murder Cases," TDCAA, Capital Murder Prosecution Course, Austin, Texas
Speaker, "Prosecuting Sex Offenses," Fort Worth Bar, Fort Worth, Texas

xi. Strike upheld based on juror's employment Rasco v. State, 739 S.W.2d 437 (Tex. App. — Houston [14th Dist.] 1987, pet. ref'd).

xii. Strike upheld on the basis that the juror looked too cool, seemed too arrogant, and appeared disinterested. Ybarro v. State, 775 S.W.2d 409 (Tex. App. — Waco 1989).

xiii. Marital status was one factor considered relevant and legitimate basis for a challenge. Crawford v. State, 770 S.W.2d 51 (Tex. App. — Texarkana 1989, no pet.).

xiv. Unemployment was held to be a legitimate reason for exercising a peremptory challenge. York v. State, 764 S.W.2d 328, 331 (Tex. App. — Houston [1st Dist.] 1988, pet. ref'd).

xv. Challenges for cause which should have been sustained by the trial court may be viewed as neutral explanations by the appellate court. (See Section VIII, p. 50 for the various challenges for cause.).

e. Unacceptable Explanations

i. "Black veniremen flocked together" is a patently racist explanation, according to the Dallas Court of Appeals. Hill v. State, 775 S.W.2d 754 (Tex. App. — Dallas 1989).

ii. "I struck [him] because I felt he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions." Hill v. State, 775 S.W.2d 754 (Tex. App. — Dallas 1989, pet. ref'd).

iii. Stereotypical statements such as "I don't like people with beards because they are lenient on crime" will be an unacceptable explanation if there is no showing that the reasons for the State's stereotypical basis applies to the venireman. Woods v. State, No. 05-88-0073 (Tex. App. -- Dallas, March 16, 1990) (unpublished); Miller-El v. State, 782 S.W.2d 892 (Tex. Crim. App. 1990).

iv. "No eye contact," by itself is too vague for the courts to accept. Daniels v. State, 768 S.W.2d 315 (Tex. App. -- Tyler 1988). But see Jones v. State, No. 05-88-0082 (Tex. App. -- Dallas 1990) (published). The prosecutor explained generally that if he was involved in voir dire and the person to whom he was talking made no eye contact, the impression he got was that they were not interested in what he was saying and would not give him the attention he was looking for at trial. Jones, Slip op. at 6.

v. Statement such as the venireperson showed more interest in the defense attorney is insufficient to satisfy the prosecutor's burden of offering plausible, racially neutral, trial related explanation for use of its peremptory challenges. Daniels, supra.

vi. Striking black venire persons because they were conservative while not striking similar white venirepersons will render such explanation unacceptable. Vann v. State, 788 S.W.2d 899 (Tex. App. -- Dallas 1990, pet. ref'd).

vii. Striking juror based upon low intelligence without addressing the juror with individual questions is improper. Chavers v. State, 796 S.W.2d 539 (Tex. App. -- Dallas 1990).

viii. Striking the venireperson because he was a member of an organization concerned with the advancement of black persons rights which had been involved in cases with the District Attorney's Office was not a race-neutral answer and therefore improper. Somerville v. State, 792 S.W.2d 265 (Tex. App. — Dallas 1990).

ix. Where a black venirewoman was struck from the jury for not having children and white venirewomen without children were not struck, then the strike was discriminatory. C.E.J. v. State, 788 S.W.2d 849 (Tex. App. — Dallas 1990).

x. A sight strike by the State or someone that the State felt would not fit with the category of jurors the State wanted would not be sufficient under Batson. Davis v. State, 796 S.W.2d 813 (Tex. App. — Dallas 1990).

f. Questionable Explanations

i. Because the juror appeared to have a dumbfounded or bewildered look on his face;

ii. Because he appeared unkept;

iii. Because he appeared gruff;

iv. Because he frowned at me and smiled at the defendant's attorney;

v. Because he appeared to pay more attention to the defendant's attorney than he did me;

vi. Because he was inattentive when I asked him questions, but when the defendant's attorney asked him questions he appeared to be attentive;

vii. Because he appeared to be in a bad mood;

viii. Because he did not appear to know what life is like or what life is all about;

ix. Because he may live in the same neighborhood where the defendant lives;

x. Because he was unemployed;

xi. Because he was overly employed;

xii. Because he was a scientist, school teacher, doctor, lawyer, judge or cook at the country club;

xiii. Because he appeared to be too smart;

xiv. Because he appeared to be too dumb;

xv. Because he was employed at X corporation and my past experience with employees of same have led me to conclude that persons employed by X corporation make terrible jurors for the State;

xvi. Because he was physically handicapped;

xvii. Because he appeared to be mentally disturbed;

xviii. Because he was too ugly;

xix. Because she was too pretty;

xx. Because he was the same age as the defendant;

xxi. Because he has a grandchild the same age as the defendant;

xxii. Because I thought the juror and the defendant were employed by the same company;

xxiii. Because he wore a gold earring in his ear.

See Keeton II, 749 S.W.2d at 877.

4. Remedy for Batson Violation

a. Under Batson:

If the prosecutor fails to rebut the prima facie case with regard to any or all of his peremptory challenges, then the trial court must act to remedy the situation. The Batson court specifically left open the question of whether this remedy is to "discharge the venire and select a new jury from a panel not previously associated with the case" or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire. Batson v. Kentucky, 106 S.Ct. at 1724, n. 24, 90 L.Ed.2d at 90, n. 24.

b. Under Article 35.261:

Article 35.261 provides that "[i]f the court determines that the attorney representing the State challenged prospective jurors on the basis of race, the court shall call a new array in the case. Despite the statute's use of the work "shall," one appellate court has held that the trial court has discretion to